The Evolution of Copyright Policies

(1880-2010)

A Comparison between Germany, the UK, the US and the International Level

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Table of Contents

Abstract 6

List of Tables 7

List of Figures 9

List of Accompanying Material 10

Acknowledgements 11

Part 1: Introduction 12

1. Introduction 12

1.1 Importance 15

1.2 Problem 18

1.3 Selection of Case Studies 19

1.4 Thesis Outline 20

2. Literature Review 22

2.1 Copyright Law as a Policy 22

2.2 The Constituent Parts of Copyright 25

2.3 Policy Evolutions 27

2.4 Stringency: The Scope of Protection 43

2.5 Summary and Conclusion 56

2.6 Original Contributions 60

Part 2: Methodology for Copyright Stringency and Culture 63

3. Introduction 64

3.1.1 Making Copyright Systems Comparable 64

3.1.2 Copyright Stringency 67

3.1.3 The Culture of Copyright Systems 69

3.1.4 Summary 72

4. Making Copyright Systems Comparable 73

4.1 Introduction 73

4.2 The Data Set 74

4.3 Comments on Coding 110

5. Processing the Data 120
5.1 Counts 120
5.2 Values 122
5.3 Ordinal-Interval Variables 123
5.4 Ungrouped data 124
5.5 Summary 125
5.6 Illustration Example: Coding the Statute of Anne 126
6. Copyright Stringency 136
6.1 Methodology: Laspeyres Index 138
6.2 Stringency as a Laspeyres Index 139
6.3 The Variables 140
6.4 The Stringency Index 143
6.5 Illustration Example: Stringency in the Statute of Anne 149
7. Copyright Culture 153
7.1 The Characteristics of the AR and CL Copyright Systems 153
7.2 The Ideal Types as Comparative Standards 154
7.3 The Classification of Variables 170
7.4 Calculation 171
7.5 Summary 172
7.6 Illustration Example: Copyright Culture in the Statute of Anne 174
Part 3: Empirical Evidence 180
8. Stringency Evolution 182
8.1 Evolution 183
8.2 Causes for Change 191
8.3 Conclusion 200
9. The Comparative Strength of Interested Groups 202
9.1 Copyright Owners v Users 203
9.2 The Digital Impact on Users 210
9.3 The Comparative Strength of Copyright Owners v Authors 216
9.4 Conclusion 220

10. The Importance of Culture 222
10.1 Legal Origin 223
10.2 The Importance of Ideal Types over Time 228
10.3 Coherence of the Copyright Systems 236
10.4 Conclusion 242
11. Convergence 244
11.1 Cultural Convergence 244
11.2 Technology and Convergence 250
11.3 The Role of Actors 254
11.4 Conclusion 275
Part 4: Conclusion 277
Part 5: Appendix 283
Appendix 1: Data 283
Stringency: Copyright Stringency 283
Culture: Copyright Culture 285
Appendix 2: Alternative Values 288
Differences 289
Impact of the Variation 292
Conclusion 307
Appendix 3: Base Year 309
Appendix 4: Glossary of Abbreviations 316
Bibliography 317
US Copyright Law Amendment History 347
UK Copyright Law Amendment History 354
German Copyright Law Amendment History 357
EU Copyright Law Amendment History 361
International Level Copyright Law Amendment History 362
Case Law 364
List of Publications 367

Abstract

The conventional wisdom on the evolution of copyright and what has shaped it has come under increasing strain in recent years. As technical innovation pushes for reforms, the results are increasingly subject to political debate and tension. Examining how copyright has evolved and what has driven the process is of key importance because of the economic importance of copyright to individual countries. In the light of this and to contribute to possible solutions, it is necessary to examine what or who has driven the process. To do this, the evolution of copyright polices has to be mapped in a comparative way.

This thesis examines the evolution of copyright in Germany, the US, the UK and at an international level between 1880 and 2010. The analysis itself is split between the culture and stringency of policies. Culture refers to the overall approach to copyright while stringency covers the scope of protection. This approach is original because it allows for a comparison of copyright systems as neutrally as possible. The results are clearly quantifiable and more importantly the extent of evolutions is directly comparable. Furthermore, the nature of the data ensures that causal forces behind the pattern can be examined.

This methodology will be applied to a number of propositions commonly found in the copyright literature. The focal point here will be on arguments of rising stringency levels over time and the cultural convergence between case studies. For these, the commonly argued causal forces, in particular technological innovation and the influence exercised by individual actors will be examined. The results show that neither the cultural or stringency evolutionary pattern nor the causal factors fully matches previous studies. First, the evolution of stringency levels has been more complex than previously argued. In addition, although there has been some degree of cultural convergence, this has not been caused by technology and even the influence of particular actors has been limited. In both cases, it is clear that the role of copyright exemptions has been under-theorised.

List of Tables

Table 1: List of propositions that have been made in the literature. 59
Table 2: Coding schedule for sections which can be present in an act. 76
Table 3: Coding schedule for explicitly stated justifications. 77
Table 4: Coding schedule for the level of originality. 79
Table 5: Coding schedule for administrative formalities. 80
Table 6: Coding schedule for the impact of formalities. 81
Table 7: Coding schedule for work types. 83
Table 8: Coding schedule for the relationship between a work and the author. 84
Table 9: Coding schedule for economic rights. 87
Table 10: Coding schedule for the transferability of rights. 88
Table 11: Coding schedule for moral rights. 89
Table 12: Coding schedule for economic right exemptions. 97
Table 13: Coding schedule for exemption conditions 101
Table 14: Coding schedule for performer exemptions. 103
Table 15: Coding schedule for moral rights exemptions. 105
Table 16: Coding schedule for enforcement 107
Table 17: Coding schedule for the protection of foreigners. 109
Table 18: Overview of the individual variables and the related data types. 126
Table 19: Summary of substantive variables for the Statute of Anne (1709). 135
Table 20: Summary of copyright variables and their relationship to the level of stringency. 141
Table 21: Summary of the components and the weighting of the components in the composite index 148
Table 22: Summary of substantive variables for the Statute of Anne (1709). 149
Table 23: Provisions in 1880 for Germany, the US and the UK as well as their average. 150
Table 24: Normalisation of the Statute of Anne's provisions by the base year 1880. 151
Table 25: Summary of the components and the weighting of the components in the composite index 152
Table 26: Spectrum outline for the classification for ideal types. 169
Table 27: The link between maximum provisions and the relative terms used to describe copyright provisions 170
Table 28: Calculation table for cultural scores, showing which variables are combined for the particular 11 AR-CL dimensions. 173
Table 29: Complete classification scheme for the individual measurable variables which indicate AR. 175
Table 30: Complete classification scheme for the individual measurable variables which indicate CL. 176
Table 31: Calculation table for cultural scores, showing which variables are combined for the particular 11 AR-CL dimensions. 178

Table 32: Reminder of Table 1: List of propositions that have been made in the literature. .. 180
Table 33: Stringency values for work types in 1880/1890 and 2010. 196
Table 34: Stringency values for economic rights in 1880/ 1890 and 2010. 197
Table 35: Stringency values for sanctions in 1880/1890 and 2010. 197
Table 36: Stringency values for copyright work in 1880/1890 and 2010. 205
Table 37: Summary of stringency developments affecting the balance between copyright owners and users. 208
Table 38: Extract from Table 1, summarising the underlying propositions of cultural convergence. 222
Table 39: Cultural scores for the copyright systems of Germany, the US, the UK and the International Level in 1880. 224
Table 40: Coefficient of Variation values for Germany, the UK, the US and the International Level in 1880 and 2010. 239
Table 41: Cultural scores for Germany, the US, the UK, the International Level and the EU... 256
Table 42: Summary of the impact of individual actors on other case studies..... 274
Table 43: Comparison of stringency values of the originality indicator for Germany, the US, the UK and the International Level. 294
Table 44: Comparison of stringency values for the threshold of protection for Germany, the US, the UK and the International Level. 296
Table 45: Comparison of the stringency index for original and amended values for Germany, the US, the UK and the International Level. 297
Table 46: Comparison of cultural scores between the higehr and amended values for Germany, the US, the UK and the International Level. 300
Table 47: Comparison of CV scores between the original and amended values for Germany, the US, the UK and the International Level..... 303
Table 48: Summary of abbreviations used in the data spreadsheets..... 316

List of Figures

Figure 1: Overview of the methodology used to move copyright policies to the stringency index and culture scores. 65
Figure 2: The overall stringency levels for Germany, the US, UK and the International Level between 1880 and 2010 184
Figure 3: Number of exemptions which have additional conditions when the work is digital rather than analogue. 211
Figure 4: Number of exemptions explicitly allowing for the circumvention of DRM. 212
Figure 5: The evolution of copyright culture in Germany, the US, UK and the International Level between 1880 and 2010. 229
Figure 6: Coherence of copyright policies between 1880 and 2010. 239
Figure 7: Convergence trends in copyright culture between 1880 and 2010. 245

List of Accompanying Material

- 1 CD containing the primary data and calculations

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Part 1: Introduction

1. Introduction

In 2004, the world of copyright owners, users and scholars was shaken by the actions of Google. Google started to digitise complete books to make them at least partially available online.[1] The scanning affected books in and out of copyright and was carried out without the explicit consent of the copyright holders. It was clear that the project has significant merit for the public because books are fully search-able and those out of copyright accessible. However, it also presented the copyright owners with a significant loss of control. Although Google acted in the US, the debate crossed national boundaries and inspired debate across the world.[2]

Copyright has been subject to vivid debates over recent years. The Google Book Project illustrates all of the major debates surrounding the development of copyright in recent years. First and foremost, the project is a reflection of the challenges that new technologies bring to copyright. Copyright is designed to benefit authors by giving them control over some of the economic uses of the works (G. Davies 2002: 14- 15). New technology places a demand on it because it enables a use not envisaged in the legislation or case law before this point. As a result, copyright owners feel they are loosing out economically as others free-ride on their work and react by demanding more protection (B. Kernfeld 2011). It has been argued extensively in the literature that copyright protection has been significantly expanded over time as a result (J. Ginsburg 1990a; J. Ginsburg 2001; L. Lessig 2004; J. Campbell 2006; C. Seville 2006; I. Alexander 2007) .

This argumentation also illustrates a wider copyright debate: the unauthorised use of works. Google Books has scanned the books without the explicit permission of

[1] Books which are in copyright are only accessible online in snippets (three lines long extracts) while those out of copyright are fully accessibly.

[2] The issue affects all countries, not least because works are held in libraries with which Google cooperates. For a fairly large selection of international press coverage on the issue, please see: (Google 2013b). For an influential German view on the issue: (Die Zeit 2013). Discussions have also occurred at EU level (Union European 2009; E. Miller 2009). Finally, it should noted that there has is a high-profile cooperation with between the British Library and Google's project (British Library 2011).

the authors. From the copyright owners' point of view, Google is a pirate and therefore similar to those who illegally download songs or movies online. Copyright owners have argued that piracy, especially online piracy, has had a major detrimental impact on their business. For example, the motion picture alone claimed a lose in 1998 of $1.42 billion (S. Wang 2003: 26). The response has been a coordinated lobbying effort for stronger protection nationally and internationally (J. Barnes 1974: 115; W. Cornish 1993: 47; J. Braithwaite et al. 2000: 44; S. Ricketson et al. 2006: 20). These pressures in turn again pushed towards a strengthening of copyright.

Despite these pushes for stronger protection worldwide, the responses across countries to Google's actions have varied significantly. International multilateral coordination in the field of copyright has a long standing tradition, starting with the 1886 Berne Convention. In response, it has been argued that copyright systems have converged: their approach to the issue of what should be protected and how has become more similar over time (F. Grosheide 1994: 204; J. Sterling 2003: 17; H. MacQueen et al. 2008: 41; S. von Lewinski 2008: 63). However, Google Books is one but not the only example of how new technology has been met with a different response. In the EU, Google's actions were deemed inappropriate (European Commission 2009; M. Barnier 2012). At the same time though, the benefit to the public is too clear to be ignored. The EU's response was its own digitisation project (Europeana). Copyright has proven to be a hurdle here. Progress is slow and uneven and in practice, only those works out of copyright are scanned (European Commission 2008; European Commission 2009). In sum, Google Books shows how copyright still varies.

These variations in response occur despite similar levels of protection. The US, EU and Japan have all an interest in strong intellectual property protection (J. Braithwaite et al. 2000: 66). They advocated stronger protection for intellectual property rights internationally, including copyright. For example, they ensured that detailed copyright provisions, especially on enforcement, were included in the TRIPs

agreement (World Trade Organisation 1994: Part III). These provisions reflect the scope of copyright protection: the particular uses and sanctions applicable to copyright. However, as the different response to Google has demonstrated, this is not the same as the underlying understanding of what copyright should be doing and how. If they were, then the different responses should not have been observable. Instead, the approach to copyright is reflected not in the presence of particular provisions but how they link with each other. Therefore, it is necessary to treat the scope of protection independently from how they link.

Google Books also shows the other side of copyright protection. Copyright is not a goal in itself but also aims at the dissemination of works. The public benefit is served because the more works are available, the more the public benefits (J. Ginsburg 1990b: : 933). By digitising works and making those out of copyright freely accessible, the range of books usable in practice is extended significantly (Electrontic Frontier Foundation 2009). Therefore, the Google Book Project also illustrates the public good side of copyright: the potential of more accessible works. This concern with access has significant economic implications in practice. Europe for example is consciously trying to facilitate its transformation to a Knowledge Society. This is in recognition that the innovation based on existing works has a significant economic value and therefore have a real impact on the competitiveness of the EU and its member states (European Commission 2008) However, these benefits come at a cost to copyright owners. Innovation is stifled by giving copyright owners too much control (R. Anderson 1998: 660).

This limiting influence of copyright has increasingly gained attention at the national and international level. The public benefit in the Google Books project is clear, as is the hindering of the copyright system.[3] There is an increasingly vocal group of users and copyright specialists who argue that copyright protection today is too extensive (L. Lessig 2004; J. Gantz et al. 2005). As a result, it is not supporting

[3] This is especially visible in the limited progress made in Europe. See for example: (European Commission 2008; European Commission 2009).

innovation but rather preventing it (L. Bently et al. 2009: 35). In response, user groups have increasingly started to oppose the strengthening of copyright (J. Borland 2003; Research Institute of Public Policy 2006; A. Moore 2012; Hamburger Verbraucherschutzzentrale 2012). However, some have gone even further. In some circles, copyright is rejected as a principle (M. Svensson et al. 2012: 3). There were even widespread street protests over the ACTA agreement (D. Lee 2012). Overall, growing resistance to copyright as a principle and the particular form it takes has increased the political salience of the issue.

In conclusion, copyright has evolved over time. Much of the change has been in response to technological change and resistance by copyright owners to unauthorised uses. Authors agree that copyright protection has expanded but they differ on the degree of this change. Not everybody agrees that the balance between users and copyright owners has tilted. In addition, despite the long history of international coordination and the convergence arguably resulting from it, the responses to technological challenges still vary significantly. In sum, Google Books is one instance when the major contemporary questions about copyright have come to the forefront. First, who benefits from copyright and has this changed over time? Secondly, is there one understanding of copyright or do they vary across countries?

1.1 Importance

These questions about how copyright has evolved are especially pressing now. First, governments have an inherent interest in protecting their copyright-reliant industries. These are a major pillar of Western economies. In the US, copyright industries contribute 7.75% ($791.2billion) of the GDP in 2001 and their growth has been twice as fast as the rest of the economy (S. Wang 2003: 24). In this light, it is argued that strong copyright protection is essential to economic development and growth (S. Wang 2003; Copyright Review Committee 2012). Therefore, instances of piracy need to be tackled as efficiently as possible because they affect the economic

prospects of a country. As a result, the preferences of copyright owners have significant political clout: protecting the economic value and exploitability of works has been considered paramount (L. Lessig 2004; B. Kernfeld 2011). Given the importance of the internet, this mind-set also has repercussions for other countries and the international coordination. For example, the US has increasingly resorted to bilateral action both via its own trade processes but also in instances such as the Megaupload case[4] (J. Braithwaite et al. 2000; M. Brown 2012). In sum, the copyright issue is important because the economic value attributed to it affects the behaviour of states.

Secondly, copyright has a significant economic value for the future. Western countries perceive themselves as Knowledge Societies where economic value is the result of innovation and intellectual creation (European Commission 1990; European Commission 2008). However, both new creations and especially technological innovation often challenge existing copyright provisions and the benefit the public and owners can derive from these innovations crucially depends on how the policy-makers and courts react to them (L. Lessig 2004: 77). These kinds of responses however depend on the larger purpose and approach to copyright within a particular jurisdiction. In conclusion, copyright is important for the economic structure of the future.

Thirdly, the copyright issue has become increasingly politicised. Copyright owners and increasingly vocal users have entered the political arena. While the first group pushes for more protection, the consumer groups have increasingly advocated reforms to account for their needs.[5] The support for copyright among users has fallen in response to increasingly invasive copyright provisions (J. Borland 2003; L. Lessig 2004: 200; J. Gantz et al. 2005: 83, 205; B. Kernfeld 2011: 211). Mobilisation has not been limited to the shape of copyright but also the concept as such. High profile

[4] In this series of events, the US took action in cooperation against the online file storage Megaupload and its owner. The owner lived in new Zealand at the time and although it cooperated with the New Zealand police, it was the FBI and therefore the US which was the main driving force (G. Sandoval 2012).
[5] The 1998 Digital Millennium Act is a good example: its exemption provisions reflect the specific needs of narrow user groups, for example libraries and encryption researchers (US 1998).

opposition by groups such as Anonymous and their glorification in parts of the internet community shows a similar trend (BBC 2011; A. Moore 2012; Hamburger Verbraucherschutzzentrale 2012). The result has been and is significant political conflict. This was reinforced by the media. The copyright issue and the importance of reforms have entered the main stream media in the wake of the ACTA protests. In sum, copyright is a major political issue.

Finally, the pressure to investigate the evolution is especially rising because major copyright reforms are in the pipeline. For example, the US is currently holding hearings on the issue. Similarly, Germany's copyright act is 48 years old (1965) and even the UK has not seen a major reform since 1988. All of these predate the digital age and were therefore written in a different context from today's world.

In conclusion, examining how copyright has evolved in the past is especially important now because reform debates are in the political space. In addition, economic interests are increasingly split between traditional copyright industries and the needs of new businesses relying on innovation under the Knowledge Society. This is in the context of increasing user opposition. To contribute to this important debate, it is essential to understand the impact of past reforms. This is also a prerequisite for an evidence-based policy.

1.2 Problem

This thesis targets three distinct areas in the literature. First, it will reconceptualise copyright law as a policy by drawing on the literature in political science. Traditionally, authors examined the setting of particular legal provisions and then applied their findings to the copyrights systems, especially if they have converged. In this approach, the policy space and the strength of provisions are intrinsically linked. The literature on policy convergence however clarifies that the overall policy space and the precise setting of instruments are conceptually distinct (K. Holzinger et al. 2005). Treating the approach to copyright and its scope as separate issues allows for a more structured comparison.

Secondly, this thesis will address the problem of extent. The general agreement is that the scope of protection has expanded over time, benefitting mainly copyright owners, especially corporate ones (J. Ginsburg 2001; J. Campbell 2006: 1646). Similarly, the overall approach to copyright has also been discussed. Again, authors agree that the different copyright traditions, reflected in the distinction between common law and civil law systems, have become more similar over time (F. Grosheide 1994: 204; J. Sterling 2003: 17; H. MacQueen et al. 2008: 41; S. von Lewinski 2008: 63). However, there is a pronounced lack of consensus about the extent of the evolutions.

Thirdly, this thesis seeks to contribute on the debates on the causal forces behind the evolution of copyright over time. To do so, it will use the empirical evidence generated here to examine if the contributing factors commonly identified in the literature did impact on the evolution of copyright in the way and to the extent previously argued. First it will investigate the role played by technological innovation on the scope of protection and the approach to copyright (J. Ginsburg 2001; L. Lessig 2004; J. Campbell 2006; I. Alexander 2007; L. Bently et al. 2009; B. Kernfeld 2011). It will also examine the influence of particular actors (W. Kingston 2002; C. Seville 2006; H. MacQueen et al. 2008: 43; S. von Lewinski 2008: 34; P. Goldstein et al. 2010).

1.3 Selection of Case Studies

This study seeks to explain the evolution of copyright policies. The chosen case studies are for Europe: the UK and Germany. This provides for a common law country and a civil law country. France tends to feature high in comparative studies because it is perceived as the ideal author rights (AR) system, especially in relation to the moral rights. However, this thesis relies on idealized models for the AR and common law copyright system (CL) for comparison benchmarks because France has never fully matched the description of the ideal AR system. The same is true for the US in relation to the CL ideal. (J. Ginsburg 1990b) Furthermore, the full codification of moral rights in France (1957) and Germany (1965) occurred after their inclusion in the Berne Convention during the Rome revision (1927). As a result, there is not an added benefit of including France at the expense of the economically stronger Germany. In addition to the European case studies, the US is also included. On one hand, this is necessary because of the US' importance in the world economy. On the other hand, it provides a control variable to European developments.

The chosen timeframe is 1880-2010 for a number of reasons. First, to identify the importance of the international dimension, any comparison has to start before the multilateral international dimension became significant. In the case of copyright law, it therefore has to be before 1886 and the Berne Convention. In addition, any earlier date would have entailed substituting Prussia for Germany, as Germany was only unified in 1871.

1.4 Thesis Outline

This thesis is divided into parts and chapters. Chapter two will outline how copyright can be analysed as a policy and how this is reflected in the existing literature. It concludes by summarising the main weaknesses in the existing literature and how the methodology used here will contribute to remedying these.

In the second part then, the focus shifts to methodology. This is divided into five distinct areas. The third chapter provides a short summary of the methodology as a whole. The aim is to outline how the methodology works and emphasise the links between the different components. Chapter four to seven then discuss the individual methodological steps in detail. Chapters fourth and five focus on making the information available on copyright systems directly comparable. It discusses the coding and processing of the data. Chapter six then moves on to the scope of protection. It will demonstrate how the concept defined in the literature can be operationalized in practice. Chapter seven is the final methodological chapter. It describes how the data is used in an effort to trace the overall approach to copyright.

Part 3 moves away from the methodology to the empirical evidence generated by it. Chapter eight presents the empirical results. It will first focus on the individual trends and therefore how the case studies have developed, both for copyright culture and the scope of protection. Particular attention is made to the role of major reforms on the stringency, culture and coherence of copyright systems. It then investigates how the case studies relate to each to other, especially if they have become more similar over time. Chapter nine shifts away from the empirical evidence and towards the factors shaping the evolutionary patterns. These include the impact of technology, the presence of a digital impact and the particular role played by individual actors. The chapter concludes with a summary of which influences explain which the cultural and stringency developments. It will also identify those instances not adequately explained.

Chapter ten moves the focus away from stringency towards culture, in particular how the individual case studies relate their respective ideal types. Special

attention will be paid to the importance of legal origin in 1880; over time and as a standard of comparison. Chapter eleven then will examine the extent of convergence between the case studies as well as the driving forces behind it.

2. Literature Review

This literature review will establish the link between copyright and policy and how this is reflected in the existing literature of the topic. It will first link copyright and policy as a prerequisite to drawn on the literature of policy evolution in describing copyright evolution. This then allows for treating the scope of copyright and the overall approach as distinct areas. It will then provide an overview of the state of art in these two areas. Finally, it will identify the weaknesses in the existing literature and outline how the thesis will contribute to remedying them.

2.1 Copyright Law as a Policy

This section identifies what copyright policies are. To use the work on policies, it first has to be established that copyright law can actually be treated as a policy in methodological terms. To do this, the term 'policy' will first be defined by defining its three core characteristics. In a second step then, copyright will be examined in the light of these requirements.

Most commonly, a policy describes a group of decisions, actions and inactions and how these change over time (H. Heclo 1972: 85; R. Hague et al. 2004: 309). Although definitions vary, a policy has three basic characteristics. The term firstly implies order, meaning system and consistency. The action is not arbitrary-it follows intent. This does not mean that unintended consequences of policies are excluded but rather that positive action follows some kind of objective. Secondly, policy refers to authority, and therefore requires legitimacy. This can be based on the policy outcomes (the aim of the policy) or the way the policy is made (input legitimacy). Finally, policy is intrinsically linked to expertise. A policy essentially claims both knowledge of the issue area and proposes solutions to problems (W. Parsons 1995: 15; H. Colebatch 2009: 8-9). This claimed rationality provides another basis for legitimacy in addition to pure authority (W. Parsons 1995: 14; M. Hill 2005: 6). In summary, to treat something as a policy, these basic features have to be covered: it has to be intentional; it has to be

legitimized by either outputs or inputs; and it has to be based on some kind of expertise. To establish if copyright law can be considered a policy, it will now be compared to these requirements. Each of the characteristic is examined in the light of copyright policy.

The requirement of intent emphasises the importance of targeted action. Copyright is statute-based and enforced mainly by private individuals in the courts. Both of these actions show intent. The statutes are the reflection of the will to balance author/ copyright owner protection with that of users (G. Davies 2002: 7). The aims vary but include for example creating an incentive to publish works or protecting the personality of the author (J. Ginsburg 1990b: 993; M. Rose 1993; G. Davies 2002: 14-15; S. von Lewinski 2008: 38). They are therefore showing clear intent although the gap between stated aims and practice can vary.

The case law also exhibits intent. First of all, private individuals make a choice in persecuting infringement. Especially corporations or interest representations will actively select cases which they deem worthy. For example, the Recording Industry Association of America's (RIAA) decision to pursuit comparatively minor cases of infringement aimed more at other infringers rather than the actual damages done by the particular individual (B. Kernfeld 2011: 211). Secondly, copyright owners may select cases in the light of the broader policy, seeking to expand existing rights. One key example here is the introduction of the broadcasting right in Germany 1926 (1926). Similarly, users may use the court system to challenge particular rights. In the US *Eldred* case, the term extensions have been challenged as unconstitutional (Eldred v Ashcroft 1999). In sum, copyright policies have an aim, even though it may not actually achieve it.

The second requirement is authority in the form of legitimacy. In copyright policy, this is a mixture of input and output legitimacy. On one hand, government action involves consultations and therefore the input of different sectors of society.

There is extensive literature on how influential different types of interests are.[6] But nonetheless the process itself is considered legitimate reflecting on the policy that is created by it (R. Baldwin et al. 1999: 18). Copyright policy is also deriving legitimacy from the output. By providing protection to authors, it is argued to create a justified return for authors because they deserve to profit from their work (M. Rose 1993; G. Davies 2002: : 14-15; R. Deazley 2004).[7] Other justifications are for example linked to the economic benefit of a copyright work. Copyright polices are therefore based on authority, derived from the both the policy-making process as such and the aims it seeks to fulfil.

The third characteristic of a policy is expertise. This is also clearly identifiable in copyright policy. On one hand, the legislator identifies problems with the system and then adopts a solution to it based on claims that it is the most appropriate one. For example, to combat rampant online piracy, the US Congress adopted the Digital Millennium Act which contained protection for Digital Rights Management. It was argued that by making the circumvention itself illegal, the efficiency of copying protection could be maintained (J. Ginsburg 2001: 1618). This in turn means that if works cannot be copied and therefore digitalised, they will not be subjected to online piracy. This shows a clearly identified issue (online piracy) and a solution (preventing the circumvention of copying control).

On the other hand, those enforcing the law also claim expertise. Individual right owners/users take legal action to enforce breaches on the basis that a particular kind of behaviour is problematic and the statute can remedy it. The courts are tasked to investigate narrow issues and apply the statute on the basis of their expertise. In conclusion, all areas of copyright policy involve the identification of problems and solutions portrayed as the most appropriate. It therefore exhibits expertise as required by the definition of a policy.

[6] For influential theories in relation to copyright politics, see for example pluralism (R. Dahl 2005); regulatory capture theory (G. Stigler 1971) and collective action theory: (M. Olsen 1969).
[7] The extent is contested but it forms part of the discourse.

In summary, copyright can be considered a policy because it has the essential features of one. Copyright shows intent in that a particular course of action is taken, both by the legislator and individuals. It also exhibits legitimacy which is based on the legislative process and on the particular aims which copyright is designed to implement. Finally, copyright policy is based on claims to expertise as problems are identified and responses are portrayed as viable solutions to them. It is therefore clear that copyright can be examined using the policy lens.

Looking at copyright from a policy angle poses the question of what is part of it. Clarifying what components are considered part of copyright is necessary before an investigation of its evolution can begin.

2.2 The Constituent Parts of Copyright

Copyright is the 'right to determine who can have a copy' (J. Gantz et al. 2005: 5). The policies across the world vary in their scope as it incorporates different things. However, it is essential to be clear about what the core components of copyright are. Today, there are three types of works which are protected by copyright. The first one is copyrighted works understood as the works of authors. This is the oldest and most traditional category of works. It includes for example literature and art works. These works are protected because a minimum threshold of originality is successfully crossed. The second group are the neighbouring rights. These are mechanical works, here especially broadcasts and sound recordings (phonograms). These works are by definition not original. However, they are of significant economic importance to the exploitation of the underlying original works. The third category of works is the performers. Protection here is not granted to the work but the performance of it-fixed in tangible form.

Copyright covers two areas: the protection of the work and the protection of the author. The protection of the work emphasises the economic value which is associated with exploiting a copyrightable work. It focuses on what constitutes a work

and the protection it has from unauthorised uses. The first aspects to consider are the prerequisites for protection. First, does the work in question fall within the specified categories which are considered copyrightable? Secondly, does the work cross the required level of originality? Copyright works need to cross a minimum threshold, although the level varies across countries. Neighbouring rights and performers are not subject to this requirement though. Thirdly, there can be formalities which need to be complied with, for example registration or the © symbols. The kinds of works protected, originality and formalities together determine if a work benefits from copyright.

Once it has been established that a work is 'copyrightable', the focus moves to the extent of protection. The emphasis in this area is the economic exploitation of the work. As a result, the key demarcation line in terms of interest is between the copyright owners and the users of works. Protection is shaped by a number of features, some benefitting the copyright owners and others the users. The important aspects to consider here are the kinds of uses which are controlled; the term that they are protected for and the available sanctions to remedy infringements. In addition, it is also necessary to consider the exemptions to protection and the conditions which apply to them. All of these areas together shape the scope of protection. They indicate who can prevent whom from copying a work in which situations. It should be noticed that protection varies between works. Therefore, each of these features have to be examined separately for every category and every kind of work protected.

The second area is the protection that the author as opposed to the copyright owner benefits from. The author has a number of prerogatives which limit the normal economic exploitation of the work. For example, they can affect the extent to which rights can be ceded by the author when he assigns his rights to a third party.[8] They therefore protect his interests against both the copyright owners and the users. The actual shape of this protection depends on the kinds of prerogatives the author

[8] For example, the resale right in Germany cannot be waived by the artist under the 1965 Urheberrechtsgesetz (Germany 1965: §26).

benefits from (moral rights); the term during which they are enforceable; the exemptions which apply to them and finally the sanctions available to remedy infringement.

In conclusion, the content of copyright includes the provisions which shape the existence of copyright, its economic exploitability and the protection of the author. It should be noted thought that copyright acts tend to cover more than just copyright, with significant cross-country variations. As a result, the question arises of which parts to exclude from the process. The only parts included here are those discussed above. This means that all aspects shaping the extent of protection for copyright work, neighbouring rights, performer's rights and moral rights are included. However, areas such as semi-conductor chips and administrative aspects, for example the organization of the deposit scheme, tribunals and others are excluded.

2.3 Policy Evolutions

In the previous section, it has been established that copyright can be understood as a policy and its constituent parts have been defined. This opens up the possibility to rely on the literature on policy evolution and its empirical methodologies to examine how copyright policy has evolved over time.

Policy evolutions are understood as the result of two individual components: the overall shape of the policy and the direction of change. Knill and Holzinger argue that analysing policies requires an examination of two distinct areas. First, the convergence of the policy as a whole has to be analysed. This refers to the combination of policy instruments and therefore the policy space as a whole. Secondly, the particular scope of protection is relevant. Here, the precise setting of policy instruments needs to be considered. These determine the mean of the regulation (K. Holzinger et al. 2005). These two areas will now be discussed in turn, starting with the scope of the overall policy.

2.3.1 Defining Convergence

In general, policies develop over time but they do so in different ways. Seeliger identifies and clarifies three possible developments a policy can take over time. He compares the similarity between two policies at two different points in time (t_1 and t_2). The first possible outcome is convergence where the differences measured at t_1 are larger than those measured at t_2. In these cases, the similarity has increased. The second possibility is divergence. The differences at t_2 are larger than at t_1. This is therefore a decrease in similarity or rise in variation. However, it is also possible that the differences observed at t_1 and t_2 are the same. This is either the case because the case studies did not move or because they developed in parallel (R. Seeliger 1996: 289-293).

Of the three possible outcomes, much of the evolution literature focuses on convergence between regulatory systems and there is significant consensus on what that term means. It describes a process as much as an end result. Holzinger and Knill define convergence as 'the growing similarity of policies over time' which implies a reduction in the standard variation between t_1 and t_2. (K. Holzinger et al. 2005: 776) Bennett defines convergence 'as the tendency of societies to grow more alike, to develop similarities in structures, processes and performances' (C. Bennett 1991: 215) This definition is commonly used, for example Knill uses exactly the same one. (C. Knill 2005: 765) In summary, convergence is essentially a relative concept: it describes developments in reference to some kind of referencing point (R. Seeliger 1996).

Within the category of convergence, a further distinction is necessary. Knill argues that there are different types of convergence which influence how the results are interpreted. This is important because it impacts on the comparability of different studies. He draws on the types of convergence defined by Heichel et al (S. Heichel et al. 2005). Heichel et al conceptualize convergence in terms of how convergence occurs, using a number of non-mutually exclusive types. They argue that convergence can occur in terms of several policy systems growing together (sigma convergence), becoming more alike overall. The second category is beta convergence which entails a

laggard catching up to a leader. The third category sees convergence as mobility (gamma convergence). It is essentially based on country rankings for a relevant indicator: if the different rankings vary significantly, the mobility of a country is high and therefore its policies have developed in comparison to the other countries. This measure is more sensitive to movement and change than the other categories. Finally, convergence can also occur as several policy systems converge around an exemplar (delta-convergence) (S. Heichel et al. 2005). In sum, convergence means that the difference between two policies has been reduced. How exactly this has come about, and therefore the relationship between these two policies, can vary though.

The relative nature of convergence means that the policy space has to be clearly defined. It is necessary to establish one coherent understanding of the policy options. For example, to examine sigma convergence all instruments need to be defined. If the country A moved from policy instrument X to Y and country B from Z to Y, all instruments X, Y and Z need to be clearly defined. Otherwise, the movement would not be identifiable. Similarly, in delta convergence, the comparative standard (model) has to be described in detail first. This is the only way to see if case studies have closer to it. Therefore, the emphasis is here on the clarity about what is compared, what constitutes variation and the requirements in defining the policy space this entails.

In summary, to analyse the convergence of a policy, a number of considerations are necessary. Convergence describes how a policy evolves over time across a defined policy space. Therefore, both the temporal and the spatial dimension need to be incorporated (C. Bennett 1991; S. Heichel et al. 2005). It is essential that the time points are the same for all case studies. In addition, the precise policy has to be defined in some kind of standardised manner. How this is done depends on the particular type of convergence under examination. One way to map the policy space is to rely on the literature of legal origins.

2.3.2 Conceptualising Copyright Culture

The focus in the literature is on convergence and therefore the growing similarity between copyright policies. This overall approach is analysed in studies working on the legal origins of copyright policy. This literature links the individual components which make up copyright to each other in such a way as to provide an image of the copyright culture, the overall understanding and approach of copyright, as a whole. As such, it moves beyond the individual components and compares the relationship between them. This means it aims to establish the similarity between copyright approaches and not only particular substantive provisions. This body of literature is based on the difference between different legal traditions, especially the Common Law and Civil Law ones.[9]

The assertion that copyright systems vary according to legal traditions forms part of a larger body of works focusing on the systematic differences between them. Understanding the copyright assumptions in turn also necessitates some understanding of the difference sat large. This section will provide this general overview.

[9] See for example: (R. Monta 1958; J. Ginsburg 1990b; G. Dworkin 1994; G. Davies 1995; G. Davies 2002; P. Goldstein 2003; A. Littoz-Monnet 2006; H. MacQueen et al. 2008; S. von Lewinski 2008).

Legal Tradition: the Difference between Common Law and Civil Law Countries

The distinctions of copyright between AR and CL are part of a larger body of literature on the importance of legal tradition. They describe more differences between the systems concerning how law is made and understood. French law, an archetype and influence on all continental law, sought to eliminate the role of the judiciary (perceived as corrupt); strengthen state power and prevent the courts from interfering with the exercise of power by the state (Thorsten Beck et al. 2003). In this respect, it has been highlighted hat continental law relies on abstract rules and a codified legal code in which there are not any gaps (at least theoretically). As a result, the answer to any particular problem can always be found by examining the solution a rule provides (K. Zweigert et al. 1987: 70). This also means that precedent does not have a role to play, given that the statutes are complete (J. Merryman 1985: 24).

Common Law is seen as fundamentally different. The law here is the result of defending property against the Crown (Thorsten Beck et al. 2003). The legislation is perceived as incomplete which means that the rules do not always provide the answer, although they follow a formalist approach in that they are highly specific (K. Zweigert et al. 1987: 71). As a result, the law has developed gradually and represents a mix of legislation and case law. Subject to previous decisions (precedent), judges have some freedom of interpretation of the law (K. Zweigert et al. 1987: 70- 71).

The Features of Author Rights and Common Law Copyright Systems

The literature on the differences between common and civil law systems has also influenced copyright. In particular, it is argued that the understanding of what copyright is and should do varies between the two legal traditions. These differences have been summarised under the labels author rights system for civil law countries (AR) and common law system for common law countries (CL).

The AR and CL systems represent a coherent set of positions on those issues affecting copyright protection. They reflect how copyright is understood in general terms and how this translations into particular solutions, especially for new problems. As such, they reflect two different cultural approaches to copyright. In essence, the AR and the CL vary on their underlying justification for introducing a copyright system in the first place (policy goals). These differences are described to have a domino-like effect on the actual shape of the copyright systems and therefore the policy content and the outcome. The discussion will first outline the different justifications since they form the underlying theme. Following from this, the key differences between the ideal types are described.

Justifications

The AR and CL systems vary on the underlying rationale for establishing a copyright system. There are a number of different justifications outlined in the literature. First, there is the utilitarianism-based reasoning that copyright is vital to the creation and dissemination of new works by securing an income for the authors or those making the relevant investment. It is therefore in the public interest to give protection to works to ensure that new works are not only created but also made available to the public (J. Ginsburg 1990b: 933).

The other group of justifications is natural rights-based. However, it is important to distinguish the basic reasoning here. In one group, the right to benefit from copyright is based on labour and the expenditure of resources. The author/

investor has spent his resources and efforts to create a work and therefore owns it, along the lines of Locke's theory on mixing labour with the commons creating property (M. Rose 1993; G. Davies 2002: 14-15; R. Deazley 2004). The other natural right reasoning, and third rationale, however is not linked to labour but to personality. Here, the author's personality is reflected in his work and this gives him control over it. This kind of justification lends itself to justify the protection of both economic and moral rights (S. von Lewinski 2008: 38). It should be noted though, these justifications are not mutually exclusive and a system can rely on a mix of these. It is their relative importance compared to each other which distinguishes the ideal AR from the ideal CL. Labour-based natural right and utilitarian justifications are on the CL side of the spectrum while the personality-based theories point towards an AR system.

The justifications inspire the actual shape of the ideal systems (policy content). The first key difference is the originality threshold of copyright systems. Any copyright system has a threshold at which it starts to grant copyright protection to a work. However, the actual level varies significantly. In a CL system, the access to works is the driving force and natural right assumptions, if present, are based on labour rather than personality. As a result, the originality threshold is very low, requiring only the expenditure of skill and labour ('sweat of the brow') (G. Davies 2002: 329; H. MacQueen et al. 2008: 42). Not even any sense of judgement is considered mandatory. In practice, this means any fixed expression is protected. On the other end of the spectrum, in AR systems, a work has to reflect the author’s personality and therefore a high degree of originality is necessary to qualify for copyright protection (G. Davies 2002: 239; H. MacQueen et al. 2008: 42; C. Seville 2010). Judgement alone is not enough, the criterion is actual creativity.

The justifications also impact on the existence of formalities and the protection granted to foreign works. If protection is based on authorship as an activity, then all authors irrespective of their nationality or their adherence to administrative procedures are worthy of protection. Therefore, in AR systems, formalities are absent

and foreigners receive national treatment, regardless of their nationality or any other similar provision. (J. Ginsburg 1990b: 994; G. Davies 1995: 4; S. von Lewinski 2008: 43) In CL systems on the other hand, copyright is not automatic but a privilege. In order to maximise the gain received by the public from granting these rights, extensive formalities are in place. One example are deposit requirements which facilitate public access to a work. These also limit the scope of copyright in practice as some works will fail to comply with the formalities. Similarly, foreign works are not protected or subject to very extensive formalities to facilitate free-riding and therefore provide benefits to the own public without making them bear the cost (R. Monta 1958: 178; J. Ginsburg 1990b: 994; S. von Lewinski 2008: 44).

Similarly, AR systems emphasize the importance of the creator whose personality is reflected in his work. He is the first owner of the rights whereby moral rights will be stronger than the economic ones. By the same token, only a natural person can be an author. Similarly, performing a work does not itself justify a copyright-like protection (R. Monta 1958: 179- 180; G. Davies 1995: 4; P. Goldstein 2003: 159). On the other hand, a CL system focuses on the economic exploitation of a work. As a result, it excludes moral rights because of their potentially damaging impact in terms of using the work. Rather, it aims to ensure the dissemination and access to the work by providing a financial return to the author or investor. This means in practice that ownership will be given to the person having born the investment which includes the author but also more significantly the employer or investor, for example the producer of phonograms (R. Monta 1958: 178; G. Davies 1995; G. Davies 2002; S. von Lewinski 2008: 49, 59). As for the scope of the rights, an AR system is expected to provide more protection and new forms of exploitation are assumed to be included while these rights have to be specifically granted in a CL system (R. Monta 1958: 177; J. Ginsburg 1990b: 993; P. Goldstein 2003: 138).

Outside of the content of the law, the systems also differ in their legal habits: the actual structure of their copyright acts. Von Lewinski argues that the order reflects

the significance of the different sections whereby the earlier they appear in an act, the more important they are. In an AR system, the importance of the author is reflected in his rights being covered first, especially his moral rights. They start with general provisions which will be followed by provisions on the work itself; the author or works protected under neighbouring rights (NR) owner; economic rights; exemptions and then the duration of protection. The following sections will cover contracts, collective management organizations and finally, the enforcement of the provisions (S. von Lewinski 2008: 41, 51, 62-63).

In a copyright act under common law, the economic importance of the works is assumed to have inspired the layout. Rather than starting with the moral rights of authors, CL systems commence with definitions. This is generally followed by the section covering the protection of the works whereby CR works are dealt in advance of the separate but equal NR. The next sections cover authorship and first ownership, again without substantive distinctions in principle. Afterwards, the duration of protection, the economic rights conferred and secondary (commercial) infringement is covered. CL system finish with provisions on exemptions and finally, if present, moral rights. Performers are treated separately (S. von Lewinski 2008: 41, 54, 62- 63). In summary, the key differences here focus on what is covered; how CR and NR are handled in relation to each other; the location of moral rights and when the term of protection is defined.

In conclusion, the difference in purpose or justification for the copyright system determines its actual shape. The ideal AR is based on the protection of the author's personality in the work. As a result, the author owns the work, the originality threshold is high, formalities do not apply and foreign works are automatically protected. On the other hand, the CL system seeks to make works accessible to the public and sometimes considers the investment of resources as the key issue. Therefore, the employer owns the work, the originality threshold is very low, extensive formalities apply and foreign

works do not receive protection. For both systems, the act structure is assumed to reflect these characteristics.

2.3.3 Factors Contributing to Convergence

As the previous section has illustrated, copyright systems can be distinguished according to their legal traditions. Although copyright laws address the same problem, they adapt different solutions (S. Ricketson et al. 2006: 10). The legal literature has examined the question of copyright culture before. There is consensus that some degree of convergence has occurred (F. Grosheide 1994: 204; J. Sterling 2003: 17; H. MacQueen et al. 2008: 41; S. von Lewinski 2008: 63). The literature identifies a number of different processes which have triggered this evolution. These include: the international dimension (meaning the harmonizing effect of international agreements), the influence of actors such as the EU and the US as well as more general facilitating forces, especially technology.

International Level

The first actor attributed with influence over other case studies is the International Level. Multilateral agreements bridge the gap between CL and AR because their member states come from both groups. They therefore have to offer a compromise which represents a middle ground acceptable to all member states (G. Davies 2002: 335; P. Goldstein 2003: 152; H. MacQueen et al. 2008: 43; S. von Lewinski 2008: 34; P. Goldstein et al. 2010: 14).

The International Level's converging effect is the result of two interlinked forces: required amendments for compliance and a moral impact. The US illustrates the need to amend its existing policies to comply with requirements. It had to abolish its constitutive formalities for foreigners when it joined the Berne Convention (G. Davies 1995: 4; G. Davies 2002: 336). In addition, the Berne Convention's advocacy of no formalities developed an indirect influence because member states went further

than they needed to in this respect. Rather than only abolishing them for foreigners, it became unacceptable in the US and UK to keep them for nationals (US 1988; C. Seville 2006: 9). Similar influences are also attributed to model laws (J. Braithwaite et al. 2000: 63).

The actual potential of particular agreements to trigger convergence however varies. The stronger the international agreement in question, the more influential it will be (S. von Lewinski 2008: 63). The Berne Convention is commonly seen as the most influential multilateral agreement (L. Bently et al. 2009: 40). The actual need for reform varies though depending on the issue. As already mentioned, the Berne Convention has required explicit amendments, especially for the US and its approach to formalities (G. Davies 1995: 4; G. Davies 2002: 336). However, it is argued that common law member states only allowed for the inclusion of moral rights because they were vague. They already indirectly provided some protection in their systems (G. Davies 2002: 336). As a result, the reforms did not require amendments to their laws (G. Dworkin 1994: 231- 232). Nonetheless, the Berne Convention also created indirect convergence pressure. Moral rights have spread over time because the idea has spread (G. Davies 2002: 336).

Other multilateral agreements are also attributed with of an influence on convergence. The Rome Convention triggered more similarities in the spread of neighbouring rights because hardly any signatory country protected all three neighbouring rights categories included in the agreement at the time (G. Davies 2002: 338). For example, Germany signed the treaty in 1961 but could only ratify it in 1966 (WIPO 2013b) after the 1965 Urheberrechtsgesetz had introduced neighbouring rights (Germany 1965: Teil II: Verwandte Schutzrechte). However, at the same time, the Rome Convention also had a divergent influence because it established the distinction between copyright right and neighbouring rights at the international level.

TRIPs is also attributed with significant influence on substantive provisions but the impact on convergence is disputed. Although minimum standard were established

in TRIPs, it did not lead to convergence-not least because the US ensured that moral right would not be included (G. Davies 2002: 339- 341).[10] However, MacQueen et al. pointed out that TRIPs and the WIPO treaties have both enhanced the converging influence of the Berne Convention (H. MacQueen et al. 2008: 43). In sum, the influence of multilateral agreements on convergence varies.

In conclusion, the International Level is expected to have a converging influence on its member states. Growing similarity is the result of a mixture of direct amendments and the spread of ideas. However, the actual strength of agreements in this respect varies. It is expected to be strongest for the Berne Convention and weaker for later agreements.

Influence of the US

The second major actor identified in the literature is the US. The US became concerned by the scale of international piracy and therefore used a mixture of Berne, TRIPs and its own trade legislation to impose copyright protection on other countries (W. Cornish et al. 2007: 390). By the 1980s, it became the single most influential in determining and enforcing the intellectual property regime (J. Braithwaite et al. 2000: 66).

The US acted bilaterally by enforcing intellectual property by using trade, especially pressuring individual countries via the 301 process.[11] In addition, the US started to take an active role at the multilateral level. On one hand, its influence was enhanced when it joined the Berne Convention in 1989 (G. Davies 1995: 1). On the other hand, the US started to actively shape the international level. Since the 1980s, it has pushed intellectual property protection multilaterally as part of its trade policy and required trading partners to provide what it considered adequate protection. (J.

[10] This would have made it actually enforceable at the international level. This gives rise to a whole range of speculation on the US' implementation of the Berne Convention.
[11] In this process, the US uses trade sanctions against those countries refusing to provide adequate intellectual property protection.

Braithwaite et al. 2000: 66). Those who had given in to this bilateral process were more likely to accept strong TRIPs provisions in the Uruguay negotiations (J. Braithwaite et al. 2000: 62). It essentially shifted forum by linking intellectual property to trade (P. Drahos 1999; J. Braithwaite et al. 2000: 66). This provided particular benefits to the US: intellectual property could be linked to trade benefits, for example giving concessions in textiles and similar sectors in return for stronger intellectual property protection (J. Braithwaite et al. 2000: 83). The trade regime also provided stronger enforcement mechanisms that any intellectual property treaty and sanctions are more effective (WTO dispute settlement) (P. Goldstein 2001: 48). In sum, the US influences other case studies by both uni-and multilaterally by linking copyright to trade.

EU

A more recent converging influence is attributed to the EU. The EU system is seen as a mixture of AR and CL characteristics (L. Bently et al. 2004: 46). As such, it allowed for harmonization despite the philosophical differences among its member states. The first converging pressure is the result of the courts. In the joined *Phil Collins* cases[12] for example, the court has argued that copyright is designed to protect both the economic and moral interests of authors which essentially bridges a key gap between AR and CL (S. Stokes 2003: 22). The other converging influence is the directives (H. MacQueen et al. 2008: 43). The UK has moved closer to the AR approach as a result of Europeanization. For example, it made the principal director in addition to the producer the joint author of a films (T. Aplin 2011: 558). Other illustrations include the work for hire doctrine for computer programs and the authorship of legal entities.

[12] Phil Collins v Imtrat Handelsgesellschaft mbh and Patrica Im-und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH (1993) Case-C92/92.

Technology

Finally convergence is also the result of technological innovations. First, copyright systems draw on a range of different rationales. This means for example that different rationales are relevant in case studies from the beginning although one might have exerted more influence than the others (J. Ginsburg 1990a; S. von Lewinski 2008: 39; P. Goldstein et al. 2010: 21). In addition countries have been subjected to similar social, economic and political structures (P. Goldstein et al. 2010: 14) The economic importance of particular new technologies means that countries have protected them under copyright law and by doing so, moved away from their principled stances (J. Drexl 1994: 103; P. Goldstein et al. 2010: 21). As a result, they moved towards each other. In summary, similarities in circumstances in combination with different rationales for protection have contributed to similarities in policy.

2.3.4 The Convergence of Copyright Culture

Convergence is proven using specific examples. Two very common examples of this approach are the convergence of moral right provisions and the originality threshold. In terms of moral rights, it is argued that approximation has clearly occurred because moral rights have been gradually introduced in CL countries. Moral rights are explicitly protected in the Berne Convention and this has been accepted by the 155 Berne member states (WIPO 2012). As a result, they are not considered an AR-only phenomenon anymore. In addition, the WPPT has spread the recognition of moral rights for performers (WIPO 1996: art. 5). Finally, they are seen to vary as much within the specific groups as between them (G. Davies et al. 2010: 1033- 1034; P. Goldstein et al. 2010: 15). This means that the difference between particular AR countries can be larger than the difference to a CL country. Therefore, differences between moral right provisions remain but they are not linked anymore to the legal origin.

Another often cited example for convergence is the level of originality required to qualify for protection. Here, the efforts of the EU are often highlighted where the

computer directive introduced a medium level of originality. This required Germany to lower its previously very high standards while forcing the CL member states[13] to raise theirs. (G. Davies 2002: 345- 346) In addition, Germany also lowered its originality level in response to the nature of works it wanted to protect. This was the result of general pressures and technological development (J. Drexl 1994: 103). A similar move is illustrated by the EU and its member states which provide for a *sui generis* right for databases (P. Goldstein et al. 2010: 21). These works are not original but of significant economic value. They have created an ad hoc work category in order to accommodate these kinds of works without changing the existing copyright law provisions. The areas of originality and moral rights show that certain identifying characteristics have spread. In essence, it is the presence of particular policy instruments which indicates that the policies have converged.

Convergence is not absolute because significant national variations remain (F. Grosheide 1994: 204; H. MacQueen et al. 2008: 41; S. von Lewinski 2008: 63). Values are embedded in the law and they tend to survive over time (S. Larsson 2011: 10). The remaining differences are seen as cultural, making debates about them rather fierce in nature (S. von Lewinski 2008: 34). This leads to Davies arguing that full convergence is not actually possible (G. Davies 2002: 351). However, values are not necessarily set in stone. Sudden social development can facilitate change and legal values do evolve when the social and legal spheres start to conflict each other (S. Larsson 2011: 10).

To illustrate this tension, the UK provides a good example. The UK actively protects long standing features of its CL copyright system. It did not introduce a private use exemption and remains strictly opposed levies (T. Aplin 2011: 577). However, it is interesting to see that the reasoning is not reliant on cultural language. The UK (and also the US) did not introduce levies for a number of reasons which include 1) unreliable documentation about the harm suffered; 2) questionable plans for the

[13] These member states are: the UK, Ireland and since 2004 Cyprus and Malta.

proceeds to both performers and record companies and 3) inability to determine in advance for what purpose a type will be used (B. Kernfeld 2011: 161).

Even if differences remain, their importance is debated because copyright systems can have functionally converged. First differences on paper do not necessarily have a real effect. Different approaches can nonetheless lead to the same outcome (J. Sterling 2003: 17). For example, there are variations in terminology across countries. The US control reproduction on the internet as part of its general right to control the reproduction of works. However, the EU has explicitly introduced an additional right for this. The same applies to its member (Germany 1965: §19a; UK 1988: 20; EU 2001: art. 3). In addition, the differences are seen as minor and not as significant as is usually assumed. They are of degree rather than kind (G. Davies et al. 2010: 2; P. Goldstein et al. 2010: 15). Therefore, copyright policies are not identical on paper. However, their functionality, the way they work in practice, can be. The remaining differences in this sense are not important for the copyright culture.

In conclusion, the literature refers to a process of significant convergence in copyright policy since the 19th century. The driving forces behind it are the harmonizing power of multilateral agreements, the power of individual actors such as the EU and the US on domestic and international policy in other (member) states as well as the general circumstances. At the same time, the literature also points out that the differences between the systems remain and are unlikely to disappear. However, their practical importance is limited as the actual protection is largely the same irrespective of the group. Therefore, the degree of convergence is debated.

2.3.5 Conclusion

In conclusion, the overall policy space in copyright has been described before in terms of legal origin, termed here copyright culture. Overall, the literature agrees that there has been some degree of convergence. However, the extent is not clear. Although some authors argue that there has been at least a functional convergence, the example of technological challenges show that there is still some significant variation. This means that is the actual extent of convergence, if there has been any, needs to be investigated systematically.

2.4 Stringency: The Scope of Protection

In addition to policy convergence, the literature on policy evolution also emphasises the importance of the regulatory mean. Holzinger and Knill argue that the mean of the regulation, the average level of regulation within a given sample, can move upward or downward over time. This is commonly termed stringency (D. Vogel 1997; M. Kahler 1998; A. Ogus 1999; D. Murphy 2004; D. Konisky 2007). However, they also emphasise that defining top and bottom is essentially a normative judgement. Common practice is to define interventionist policies with the top and laissez-faire with the bottom (K. Holzinger et al. 2005). It is therefore necessary to establish how stringency can be described.

2.4.1 Defining Stringency

In the existing literature, the scope of protection in copyright is linked to the balance of rights between copyright owners and users. An expansion in scope reflects strengthening the rights of copyright owners. Reducing the scope would strengthen the users because it limits the applicability of copyright protection. This assumption is not always made explicit but it is the underlying assumption in most writing on the issue.

In the traditional legal scholarship, for example, writings on the Berne Convention refer to minimum standards by protecting essential author rights (S. Ricketson 1987; S. Ricketson et al. 2006). The same understanding is also visible in more mixed studies, such as law and economics. Stricter levels here are associated with more control over the use of the work by the copyright owner (W. Landes et al. 2003). This understanding is also very explicit in works that criticise the existing protection as too extensive. Lessig argues that copyright owners have gained more control over works. This has shifted the balance in their favour and away from the users or the public good (L. Lessig 2004). Finally, the main stream media also links more protection with benefits for the authors (BBC 2011; A. Moore 2012; Hamburger Verbraucherschutzzentrale 2012; A. Meister 2013). In conclusion, the common approach to the scope of protection is to link the strength of protection with ownership control.

Some clarification is necessary though how this stringency concept applies to copyright. In other policies and regulation, government intervention and therefore more stringency translates into more consumer protection and additional costs for the regulated, usually business. For example, in the seminal work Trading Up, Vogel refers to stricter laws as meaning more environmentally friendly legislation which is pushed by a mixture of environmental and consumer groups (D. Vogel 1997: 5-6; 21). However, copyright polices have a more differentiated impact. On one hand, the cost of regulation is imposed on the users of protected works and therefore the consumer. On the other hand, many copyright owners are also users of protected works, standing on

both sides of the divide. Taking a look at the major stakeholders involved clarifies this problem.

Copyright policy does not feature a clear division of interests. The interests of the different groups involved in copyright has started to fragment (C. Seville 2006: 10). Rather, a wide range of interested parties exist. For example, the copyright review in Ireland distinguishes between copyright owners, those representing them, entrepreneurs, users and those concerned with heritage. All of these have overlapping interests (Ireland consultation paper p. 9-10). As a result, the stringency standard is not as straight forward as it seems on the surface.

The solution here is to focus on the level of state intervention which is implicitly used in the traditional classifications as well. In traditional regulatory areas, for example environmental regulation, the state intervenes to protect consumers. As a result, more consumer protection is directly related to more state intervention and more stringency.[14] Similarly, less stringent regulation entails a withdrawal of the state: it intervenes less. This logic can be applied to copyright policy although the benefiting group is different. State intervention here translates into more stringent regulation, however, the beneficiaries here are intellectual property right owners and authors. By the same token, less stringent regulation is characterized by less state intervention which in turn benefits the users of protected works.

In practice, stringency therefore refers to the extent that works can benefit from protection. This is by definition exactly what legal analysis has focused on extensively. For example, the first edition of Copinger's commentary on copyright law sets out in detail which kind of work benefits from what particular provisions. It does not only list what is not permitted, but also emphasises where protection ends. Later editions highlight the impact of reforms in the extent of protection, for example if an additional use of a work is now restricted or an exemption has been confirmed in the

[14] Consumer groups push for more regulation. See for example Vogel for an account of consumer groups in environmental regulation (D. Vogel 1997).

courts. It therefore highlights if this balance between copyright owners and users has shifted. In summary, stringency is defined by those aspects which make up legal analysis: the positive protection and exemptions which affect particular work types or authors, the prerequisites they have to meet; as well as their enforcement.

In conclusion, stringency is understood as the intervention of government to protect copyright owners and authors. This intervention is visible in how the legislation and the case law provide for the protection of particular works at the expense of the uncontrolled use by third parties. It therefore is a reflection of the balance between copyright owners and users as struck by the government and its courts. It is the scope of protection that copyright owners enjoy.

2.4.2 The Evolution of Copyright Stringency in the Literature

The literature agrees that the scope of protection has expanded over time (P. Drahos 1999). This trend is the result of different factors. There are forces which push for stronger protection and therefore rising stringency levels. However, the same ones can also restrict the increases in protection because they bring opposing actors into action. This section will first discuss why stringency levels rise. It will then change focus and describe how the same force also limit rising stringency levels.

Factors Contributing To Rising Stringency Levels

The evolution of copyright is shaped by a number of different factors. The first one is piracy. Its impact varies depending on the specific kind of piracy in questions. On one hand, piracy can be the result of ignoring existing law. In these cases, the activity harming the copyright owner is already deemed infringement. However, for one reason or another, they cannot enforce it effectively. As a result, the pressure is to ensure that enforcement gets more efficient. One example for this type is the large scale infringement of works online, for example the illegal downloading of songs. The policy-makers reacted by making the Internet Service providers part of the

enforcement effort.[15] They now have to take down infringing material if they are notified about it by the copyright owner.[16] In sum, existing copyright can suffer from enforcement issues. These in turn facilitate stronger copyright protection.

The second kind of piracy is international piracy which operates across borders. However, copyright protection is essentially territorial in nature. This means that protection only applies domestically but not to another state (W. Cornish 1993: 47; J. Braithwaite et al. 2000: 44).[17] For example, in the 19th century it was common for books to be copies without permission in other countries and these unauthorised copies would often be re-imported into the country. This pattern had a double impact on the rights owners. They lost the foreign market and it harmed the domestic sales (S. Ricketson et al. 2006: 20). To resolve the issue, international minimum harmonisation was pursued. For example, the UK was aware that only international protection could prevent unlicensed prints from entering its domestic market (J. Barnes 1974: 115). The same issues still apply today and international protection is still seen as the solution (J. Braithwaite et al. 2000; P. Yu 2009). In sum, international piracy triggers a response towards stronger protection using the international route to protection. Specific measures are required by international agreements and therefore spread across countries. National copyright systems are therefore strengthened because compliance with multilateral agreements requires it.

The second cause for rising stringency levels is the spread of ideas across countries. International coordination also has a more indirect influence on the domestic sphere. It disseminates a particular view of copyright protection and therefore contributes to the norms in the field. This norm-setting on intellectual

[15] ISP enforcement has been added to the copyright acts, for example the UK's Copyright, Patens and Designs Act (s.97A) and the US Copyright Act (s. 512 1 e)).

[16] Some data on this available. For example, Google publishes statistics on the takedown requests it gets: (Google 2013a).

[17] In general, states cannot take action again measures of another state However, under the 'effects doctrine', when activities abroad have an effect domestically which contradict domestic legislation, then action can be taken. Both the EU and the US have such an effects doctrine although enforcement limitations exist (I. Brownlie 2008: 309- 311).

property issues is done largely by shaping model laws. Model laws are designed by international organisations, national law reform bodies but also business NGOs (P. Drahos 1999). The EU for example strongly supported the drawing up of model laws for the Berne states as a way of having their copyright interpretation spread (European Commission 1990: 5) Similarly, the WIPO arena is of little importance to the US compared to TRIPs. Nonetheless, it offered the US a way to adapt the international system to the challenges of digitalization (J. Braithwaite et al. 2000: 64, 68).

Stringency levels have also been expanded in response to technological challenges. New technology has increased the possibility for market-place imitation as copying is cheaper than creating new works. Kernfeld has described this pattern in detail. Unauthorized use has always been a feature of copyright protection and most of it was the result of technological developments. These create a new way of using or exploiting a copyrighted work which had not been anticipated by the copyright owners. It therefore alters the balance between the owners and users of copyrighted material in favor of the user-the new use is not yet protected by copyright. Copyright owners react by labeling the new form of exploitation 'piracy' and lobby for enhanced protection. This in turn leads to legal change as copyright owners seek to benefit from the new uses (B. Kernfeld 2011: 218).

Since the advent of digital technology, the issue got a new sense of urgency. Infringement by individuals took on a new magnitude of threat to copyright owners. Copies can be made faster, cheaper, in better quality and can be distributed more widely (E. Fleischmann 1988: 6). For example, the music industry was not too concerned as long as copies were made for personal use and in small numbers (J. Gantz et al. 2005: 14). However, online infringement was met with coordinated strict enforcement and lobbying (L. Lessig 2004; J. Gantz et al. 2005; I. Alexander 2007; B. Kernfeld 2011). In sum, new technology often allows for new uses of works. These are not subject to copyright, making copyright owners argue that more protection is necessary to limit this free-riding. The pattern has accelerated in the digital age.

Another factor facilitating stronger protection for copyrighted works is the author-based discourse. In the political debate, the harm of piracy is attributed to the authors and creators rather than the corporate copyright owners. It is the vision which Campbell and Rose describe this image as the romantic author: the lone poor writer (M. Rose 1993; J. Campbell 2006). Expansions in the scope of protection are commonly justified by the harm it has on the author (S. Sterk 1996: 1199). This way of justifying copyright expansions is not new but rather has always shaped the evolution.[18] In this respect, expansions are necessary to ensure that the author gets the benefits he deserves in return for his work.

The author-based rhetoric is reinforced by the choice of language. Using the term piracy includes a claim to moral high ground because it includes moral condemnation (S. Ricketson et al. 2006: 21). Therefore, using the term to some extent already divides the good and the bad, separates worthy from unworthy unauthorised uses of a work. The moral impact has been significant enough to influence the perception of countries. As Seville points out, international protection became linked with national identity and moral standing (C. Seville 2010: 20). In essence, not providing protection became unacceptable. It negatively influenced a country's international reputation (C. Seville 2010: 42). In sum, a mixture of the author's plight and the moral judgment implicit in the term piracy has served to facilitate expansions in the scope of copyright.

Another factor facilitating the extension of protection has been the weakness of consumer groups, especially at the international level. Consumer groups failed to recognise the trends for a long time. One major factor is the lobbying influence of business interest groups on policy. For example, by the time consumer groups understood the importance of TRIPs, it was too late (J. Braithwaite et al. 2000: 72). The 1990s WIPO negotiations was the first time that consumer protection groups actively lobbied against too strict laws (J. Braithwaite et al. 2000: 64). Therefore, given the

[18] Rose, for example, shows how the booksellers pushed for copyright protection under the umbrella of authors' rights (M. Rose 1993).

strength of business interests and the weakness of the opposing consumer ones in the policy process, the scope of protection has expanded at the international level.

In sum, there are a number of factors which have facilitated stronger copyright protection. On one hand, there is national and international piracy. These situations trigger a call for more protection because the rights already guaranteed are not having the desired impact on the ground. A similar pattern develops when technological innovation creates new uses for works which are not already subject to copyright control. This is further strengthened by the spread of ideas across countries, especially via the international level. Essentially, the view that copyright owners should benefit from a particular way their work is used gains currency over time. The effect of these arguments are especially pronounced if the damage is linked to authors rather than corporate owners and morally charged language such as piracy is used. It is further enhanced by the weakness of consumer groups.

Factors Contributing to Lower Stringency Levels

The previous section has outlined the factors facilitating rising stringency levels. However, this is only part of the story because these forces can also develop a limiting influence. The economic impact of piracy is disputed (S. Ricketson et al. 2006: 21; B. Kernfeld 2011: 193). These claims are part of enhanced protection campaigns. As a result, they are biased towards higher damage levels. Authors and publishers seek to make the situation more pressing (J. Barnes 1974: 96- 97). In addition there is not any that copyright is beneficial. Some authors concluded that there is no evidence that copyright protection has fulfilled its aims in either the number of books sold, author income or amount of new works (E. Höffner 2010: 385). Furthermore, a lack of protection is not necessarily the same as not getting an economic return. For example, in the absence of official protection for foreigners, unofficial foreign copyright was still possible in the US (S. Ricketson et al. 2006: 21). These arrangements would naturally limit the impact because the economic impact would be softened. Overestimating the impact of piracy has led to resistance to reforms benefitting copyright owners.

In addition, open source projects prove that there are other factors involved outside of pure economic benefit (J. Campbell 2006: 8- 9).This argument emphasises the success of the open access movements, for example the Creative Commons or Open Source Software. For example, the Creative Commons permits access to the work. The scope of commercial use however depends on the particular license in question (Creative Commons 2013b). In these models, the copyright stays with the author and is not assigned to an intermediary. A similar approach is followed by the Open Source Software movement. The different Linux distributions all operate under an open access umbrella.[19]

The way the damage is attributed to the author has also triggered significant opposition. First of all, the reality does not comply with the romantic image of the author that the industry invokes (J. Gantz et al. 2005: 1; J. Campbell 2006: 12). The majority of works today are not created by the independent author. Instead, they are made for hire and therefore owned by the employers (J. Campbell 2006: 12). Therefore, it is not surprising that extensions are pushed by corporations (L. Lessig 2004: 233). Even if this is not the case, exploiting the work economically usually requires the author to cede their copyright. They therefore do not benefit directly from the extensions either (J. Ginsburg 2001: 1646). For example, the US copyright term extension under the Sonny Bono Act is vested in the corporate owner rather than the authors' heirs (J. Ginsburg 2002: 6). And even if authors actually get an increased economic return, extensions benefits mainly bestsellers (E. Höffner 2010: 388) and not the smaller, unknown authors.

Similarly, the term piracy is selectively used. Lessig points out that many of today's copyright protecting industries have first started out as pirates, relying on formerly unauthorised uses. Examples include the record industry or the cable networks (L. Lessig 2004: 77). After a phase of prohibiting the particular practice, the industry aims to contain it. It then assimilates it into its business practices (B. Kernfeld

[19] This does not mean that there is no commercial component. For example, OpenSuse will charge for support services.

2011: 218). Therefore, activities termed piracy are often exploited by the copyright owners themselves.

In sum, the particular forces pushing for stronger protection also create resistance to it. The impact of piracy is and has been for a long time overstated by copyright owners to elicit a political response. In addition, although attributing harm to the 'poor author' makes the public more sympathetic, the growing awareness about work for hire and corporate ownership create disillusionment based resistance. This is reinforced by the use of the emotive term piracy for uses which are unauthorised but not actually infringing. Finally, there are models which work without relying on copyright to generate income.

Summary

Criticism of existing protection has detrimentally affected the legitimacy of copyright. A new voice on copyright has emerged which is anti-protection in nature and was triggered by the handling of the digital media (K. Bowrey 1996: 327). Essentially, there is no proof that copyright really acts as an incentive to create although there is some evidence that the opposite may be true. As the expansion in scope became clearer, opposition developed in the form of consumer interest groups which have started to challenge to perceived capture of government by business. A number of distinct factor have contributed to the rising stringency levels. On one hand, the economic harm caused by unauthorised uses, whether they were openly infringing or ones not covered by copyright policies, have pushed towards more protection. This was enhanced by attributing the harm to authors rather than corporations. Finally, the weakness of consumer groups meant that the opposition to expansions was limited in its political effectiveness.

However, as the protection expanded the same factors facilitating it also inspire resistance. It became increasingly clear that the impact of piracy has been exaggerated and action may therefore not be needed. In addition, works today are

often owned by corporations concerned with profit. They shape the legislation to reflect their needs rather than that of the individual author.

2.4.3 The Scope of Protection

The diverse impact of the factors shaping the scope of protection is reflected in the literature. Although scholars agree that authors have benefitted from more rising stringency levels over time, they disagree on whether this has tilted the balance between copyright owners and users.

Rising Stringency

There is general agreement that the scope of copyright has expanded over time. This is clear from the individual provisions and what types of work they cover. Looking at what the acts protect in 2010 compared to 1880 already shows the scope has expanded significantly. By 2010, all of the case studies protect neighbouring rights, for example broadcasts and sound recordings. These are inventions of the 20th century and therefore necessarily represent new additions. In addition, the particular terms have also expanded, for example the term of protection which has been extended from 56 years in the US to 70 years after the author's death. However, stringency has not only increased because provisions have expanded. In addition, the focus of protection has moved away from direct copying to control in derivative works and therefore away from the physical copy of a work to the work itself. (J. Ginsburg 1990a: 1885- 1887). Copyright laws include a number of controlled uses which do not require actual copying, for example the control over adaptions.

Rising stringency is also reflected in the incorporation technology provisions into the laws, especially the protection of digital rights management facilities. Although digital technology makes copying easier, it also allows for more control than analog technology (J. Campbell 2006: 2). In all case studies examined here, the circumvention of technical measures designed to protect copyrighted material is today considered a

breach of the law. By prohibiting the circumvention, copyright owners now have the ability to restrict the use of their work significantly more than they have been able before. For example, they can determine how often a book can be read or a song listened to. This represents a fundamental shift from regulating the use of technology through law to regulating use by the design of the technology (T. Gillespie in Kernfeld (J. Ginsburg 2001: 1632; B. Kernfeld 2011: 183). This ability to control the actual use of a work rather than only its copying represents a strong move towards more stringency.

Expanding protection is visible in how the copyright is enforced. The third approach taken by copyright owners was to enhance enforcement on the ground. The copyright owners, led by the music and film industry, have brought a large number of court cases aimed at limiting infringement by individuals. On one hand, these targeted the supply and distribution networks through which infringement occurred (UMG Recordings, Inc. v MP3.com, Inc. 2000; A&M Records, Inc. v Napster, Inc 2001; I. Alexander 2007: 847- 848). On the other hand and different than before, individual users have been targeted. P2P networks essentially decrease the commercial importance of intermediaries, therefore the only real aim for copyright owners are the individuals (B. Depoorter et al. 2005: 361). In summary, in addition to an overall increase in stringency in terms of substantive law, enforcement has been stepped up by attacking both the distribution level as well as individuals.

These observations however do not necessarily imply that the balance of power has actually shifted between users and copyright owners. Expanding the protection for owners does not automatically imply that the users lose out. Exemptions for example can act as a balancing factor as they limit the application of the law. Copyright policy has to meet two opposing targets. It needs to provide economic return for the copyright owners and ensure the creation and dissemination of new works. For this reason, limitations to copyright protection are the valve ensuring continued innovation, especially when advances are in the form of continuous improvements (R. Anderson 1998: 660). In this respect, the alternatives to

the official copyright approach can be seen as evidence of the stifling impact copyright can have today.

Tilting Balance

The arguments about balance however have changed in recent years. With the advent of digital technology, infringement by individuals took on a new magnitude of threat to copyright owners. The rights owners view, they are faced with a large number of potential pirates who cannot only make high quality copies but also share them efficiently among each other (E. Fleischmann 1988: 6; L. Lessig 2002: 7; B. Kernfeld 2011: 182). Their response was the same as before: calling for more stringency. However, the response by the legislator was qualitatively different.

Shifting balances are reflected in the particular criticism of copyright protection. First, copyright is criticised for the kinds of works it protects: not all of them are seen as inherently copyrightable (L. Bently et al. 2009: 35). There have been restrictions on the kind of works copyright protects. One core example here is the on-going debate about databases. In the US *Feist* case, a database was denied protection on the basis it lacks the necessary originality to qualify as a copyrightable work (Feist Publications, Inc. v Rural Telephone Service Company, Inc. 1991). However, the same work can get protection in the EU, even though a less extensive one than other kinds of works (EU 1996: chapter III). The EU is criticised for protecting databases because these do not fit the traditional categories, especially unoriginal ones. Creating a separate category for them recognises this.

The second set of criticisms focuses on the substantive protection available. Lessig argues that the copyright owners have gained more protection over the years. The balance of power has shifted in their favour and away from the users or the public good (L. Lessig 2004). He illustrates his argument with the term expansion of the Sonny Bono Act (L. Lessig 2004: 233). The impact of the extensive protection is especially keenly felt in the digital environment. It has started to limit the public domain to such an extent that it makes innovation using the internet difficult (L. Bently et al. 2009: 35).

Essentially, the same behaviour which was legal before and/ or seen as no real issue, now constitutes serious and punishable offenses (J. Gantz et al. 2005: 54). In this sense, copyright rather than piracy has become part of the problem rather than the solution to it.

Conclusion

In conclusion, copyright has undoubtedly increased in stringency. The individual provisions have expanded in scope and more uses are controlled today. They have moved away from direct to copying towards a broader concept of what copyrighted works are. In addition, more effective enforcement and DRM have contributed to this trend. As a result, some argue that the balance of protection has tilted over time, benefitting mainly copyright owners, especially the corporate ones.

2.5 Summary and Conclusion

Existing legal studies have established that copyright policies have evolved over time, both in terms of culture and the scope of protection. It has been established that the approach to the copyright problem has become more similar over time. This has been identified in relation to two the AR and CL systems which are identified as loosing importance. Similarly, it has been consistently argued in the literature that the stringency of protection has increased over time. The conclusion is based on the spread of particular provisions across countries. Nonetheless, the end result is more debated, especially if the balance has shifted towards the copyright owners. There are a number of weaknesses in the literature.

2.5.1 Weakness in the literature

The first issue is the idiosyncratic nature of copyright analyses. The most important weakness refers of comparability. This issue is created by a number of individual factors. First, there is the problem of terminology. National legislations and international agreements do not use the same terms to describe the same phenomena. As a result, there is significant variation in the content of any particular terms. It is difficult to use commentaries because the terms are particular to the specific system it discusses. If more than one case study is used, terms may be defined indirectly but it is not standardised. Every author conducts their investigations in their own way. The result is variation in the understanding of phenomena despite the same terms being used.

For example, it is possible that an author compares country X to country Y, using Y as the reference point. In this case, the terminology would most likely align closely with Y. However, if countries X, Y and Z are compared and X is the reference point, then terminology would be closer to X. Because X and Y differ in their understanding, the conclusions of the two studies cannot be combined without additional effort. As a result, the findings between studies cannot be easily combined.

Another issue is the temporal dimensions, especially in studies of convergence. Most of the studies are not clear about the date of comparison. However, this is a major issue because the developments over time cannot be aggregated or averaged (R. Seeliger 1996: 298). As a result, findings drawn from early in a year do not necessarily match those for later in the same year. The legislation can have been amended or an important case has been decided. Therefore, combining findings is problematic because the time points of the analyses are not clear.

The second is the scope of studies: they are very narrow. The idiosyncratic nature of the literature is best illustrated in the dominance of small n studies. Legal analysis is often doctrinal and therefore requires significant qualitative input. This naturally limits the number of case studies which can be compared in any one study,

given that resources are limited. Many studies focus on a single case or very few case studies. Legal commentaries for example provide a great amount of detail but trace the evolution over time for this one particular case study.

Even if studies include more than case study, they do not examine all relevant areas at once. Instead, they focus on particular issues, for example moral rights (E. Adeney 2006). Even if they are concerned with the overall scope of protection (W. Landes et al. 2003), they do not define it. Similarly, studies focusing on convergence investigate particular areas when they investigate the importance of legal traditions. They trace the spread of particular features over time which in turn are interpreted as representative for either AR or CL (J. Drexl 1994: 103; G. Davies 2002: 345- 346; P. Goldstein et al. 2010: 15, 21). However, they only examine a selection of indicators and not all of them together. As a result, each individual study only provides insight on one area, neglecting all others. This would not be a problem if the results of different studies could be combined.

The result of these inconsistencies across studies and the difficulty in combining them is a lack of clarity about the outcome of the developments. It is not clear to what extent countries have converged in terms of culture or the stringency levels have risen. The following 11 distinct assumptions and arguments which will serve as the research questions in practice and which will be examined here (Table 1). The original contributions that this thesis makes focus on these issues.

	Proposition	Explanation
1	Stringency levels have increased over time.	The level of overall stringency has risen between 1880 and 2010.
2	Technological innovation has caused the rising levels of stringency.	The rise in stringency levels has been a response to the development of new technologies and how these were incorporated into copyright policies.
3	The effect of stringency on the individual has been particular pronounced in the digital age.	The digital age has had a particular effect on stringency, accelerating the trend of rising levels of protection.
4	Corporations have over-proportionally benefited from rising stringency levels in comparison to users.	Corporations and not users have benefitted from copyright reforms.
5	Corporations have over-proportionally benefited from rising stringency levels in comparison to authors.	Corporations and not authors have benefited from copyright reforms.
6	Copyright systems have converged over time.	Copyright systems have become more similar over time.
7	Older copyright policies will show the strongest link to the traditional cultural approach.	Legal traditions and therefore the closeness between a policy and the respective traditional approach are most pronounced in earlier stages of the policy.
8	Copyright policies have moved way from their respective ideal types over time.	Copyright policies have become hybrids over time, moving away from their traditional approaches to copyright.
9	Copyright policies have become increasingly settled over time in how they perceive the purpose of copyright time.	Copyright policies have become more coherent over time and therefore across the different policy areas.
10	The cultural convergence of copyright has been caused by technological innovation.	The convergence of copyright policies on a similar approach has been in response to technological challenges.
11	The cultural convergence of copyright has been caused by individual actors.	The convergence of copyright policies on a similar approach has been in response to the influence of a particular actor on another one.

Table 1: List of propositions that have been made in the literature.

2.6 Original Contributions

This thesis seeks to make original contributions to different areas. The main contributions here are conceptual, methodological and empirical.

The first major contribution is conceptual: linking copyright evolution to the literature on policy evolution. By linking copyright developments to policy studies and drawing on insights about how policies converge, the methodological original contribution is to provide a complete methodological toolkit to turn copyright policies and case law into directly comparable data. By being explicit about how the analysis is conducted, it is not only possible to compare the findings to other studies but also across time. The approach is also fully reproducible and can be applied to new case studies as well. This in turn will help to remedy the lack of comparability across copyright studies.

The toolkit relies on a number of smaller methodological contributions. First, it provides the basis for coherent coding and interpretation of the law. The detailed coding schedules can be applied to code any copyright system because they are consistent and cover the relevant areas of the law. Secondly, the stringency of protection of copyright systems is defined as a concept and made measurable.[20] Instead of focusing on one narrow area of copyright systems, the features affecting the overall strength of protection are grouped by what they affect and how they link to the strength of protection. They are made measurable and comparable across time and case studies by expressing the values in terms of a base year. Overall, this means that the scope of protection is turned into one coherent concept and operationalized in such a way as to give numerical expression to the developments over time.

The third methodological contribution affects culture. Based on the notion of legal tradition, the different copyright systems are formalised. It uses the common law and civil law systems as epitomised polar opposites and defines the gradual

[20] For a detailed explanation, please see 6. Copyright Stringency.

differences between the two in eleven distinct areas.[21] As a result, the policy space is conceptualised coherently. The variation between copyright systems is not only conceptually clarified but also operationalized. This means in sum that the policy space in copyright has been systematically identified in such a way as to make changes directly comparable over time and across case studies. In summary, this thesis provides a methodological toolkit to make the evolution of copyright systems directly comparable. As such, it can also be applied to additional case studies with no or very little adaptation of the framework.

By making copyright measurable and comparable across case studies and time, the evidence will contribute the existing literature. First, it will map the cultural and stringency trends over time. It therefore provides clarity on the extent of particular evolutionary shifts. However, the evidence is not limited to the trends. It can also be used to draw conclusions on the distributional effects over time, for example if corporate owners have benefitted more than authors. Secondly, because the data is directly comparable, the impact of factors arguably having shaped copyright systems can be examined. It is for example possible to analyse how the introduction of neighbouring rights has impacted on a particular system and if this has varied across case studies.

In addition to the literature on copyright, this thesis also contributes to the existing body of work on policy convergence. First, it provides a complete data set for the analysis of convergence. There are similar studies in relation to tax policies and environmental policies, among others. In addition, it also provides detailed information on the change in the regulatory mean. The combined results can be used to test general convergence hypothesis, for example the importance of international coordination or regulatory competition.

Finally, the empirical evidence will also be important for the on-going debate on copyright reform. In the light of pressures to reform existing protection and major

[21] For a detailed explanation, please see 7. Copyright Culture.

reform projects for example in the US, empirical evidence on how past reforms have affected the shape and scope of the policy are of added importance. For example, the evidence generated here shows who has benefited from reforms and to what extent. In addition, knowing how reforms have affected copyright in the past also means that the evidence can be used to evaluate the impact of new proposals more precisely. As such, it can therefore contribute to evidence-based policy making.

Part 2: Methodology for Copyright Stringency and Culture

This section provides an overview of the methodology used to determine culture and stringency in copyright policies. It is made up of a number of consecutive stages. To facilitate the discussion, it is beneficial to outline the overall process first before the individual components are discussed. The detailed discussion of the individual components is provided later in the relevant chapters.

An overview of the methodology is provided in Figure 1.[22] The summary will first outline the coding and data processing stages which aim to make the data drawn from the case studies directly comparable. The second part focuses on stringency and how the data was used to arrive at a single stringency index score. It then moves on to the cultural dimension of copyright, based on the systematic differences between Author Rights and Common Law copyright systems.

[22] It is recommended to use this graphic (a removable version is provided) when reading this thesis.

3. Introduction

3.1.1 Making Copyright Systems Comparable

Encoding the Law

The process starts with coding the legislation and case law. Copyright terminology varies across countries. For example, the right to perform a work can include performances in front of an audience but also by using technical equipment. The exact content varies not only across countries but also over time as technology develops. To ensure comparability, it is therefore necessary to apply a consistent terminology. For this purpose, a complete set of definitions for the relevant copyright aspects was designed (coding schedule). These definitions are characterised by their narrow scope: they do not overlap.[23] Their second characteristic is precision. When they are compared to any copyright law, the possible answer is either 'yes, this feature is present' or 'no, it is not present'. Therefore, all the data at this stage is binary: provisions exist or do not. At the end of this stage, a complete list of available features has been created for each case study at each point in time. The data at this stage is therefore directly comparable very detailed, reflecting the underlying qualitative information. Each feature is a standalone data point.

[23] The coding schedule was based on the detailed study of primary sources. It was also dynamic in that formerly unaccounted for aspects of the law could be added and then applied to all case studies.

Figure 1: Overview of the methodology used to move copyright policies to the stringency index and culture scores.

	Making Copyright Comparable	
	(1) Encoding the Law	**(2) Processing the Coded Data**
Activity	The laws of the particular case studies are coded using the complete set of definitions.	The binary data is grouped by area to give the individual components meaning.
Data Types	Binary	3 point and 5 point interval scale; Count; Value; Ungrouped binary data

Stringency		
(3) Designing the Stringency Index	**(4) Normalisation**	**(5) Calculation**
The composite index is made up of 6 distinct areas which cover the relevant areas for determining the scope of protection: threshold of protection, protection for CR, NR, performers and morals rights as well as enforcement. For each, the representative indicators are chosen.	Each individual indicator is normalised according to the base year 1880. This represents the average provisions for each indicator as protected by Germany, the US and the UK in 1880.	The normalised indicators are combined according to the composition outlined in stage 3.
5 point interval scale; Count; Value; Ungrouped binary data	Index values	Index value
Culture		
(3) Designing the ideal Types	**(4) Classification**	**(5) Calculation**
The ideal types are broken down into 11 distinct dimensions, each featuring a 5 point spectrum to distinguish between an ideal common law system from an ideal author rights system.	The processed data is placed on a 5 point scale. For each component, the meaning of the scale is determined by the indictors relationship to the common law– author rights spectrum. 1 is assigned to ideal common law and 5 for ideal author rights characteristics.	The relevant indicators for the 11 individual dimensions are combined. The overall averaged score represents the position of a particular copyright system on the 5 point scale.
3 point and 5 point interval scale; Count; Value; Ungrouped binary data	5 point discrete interval scale	5 point continuous scale

Processing the Data

The presence of legal provisions by itself has only limited meaning. As a result, the individual data points need to be grouped (recoded) into variables: components which reflect substantive policy areas. This is done in a number of different ways. Most aspects of the policy can be counted, for example the number of rights the policy provides to the copyright owners (economic rights). Here, the individual data points, each representing one particular existing right, would be counted under the heading 'economic rights'. The second group are those variables which convey a numerical value. In practice, this only affects the term of protection for economic and moral rights. The important information here is the number of years that a work benefits from protection, therefore, no additional processing is necessary.

The third data type is ordinal/ interval variables. There are two of these variables overall: the impact of formalities and the level of originality. They share that their provisions are not countable or even numerical by default but instead values are assigned based on a set of definitions. These definitions can be ranked and provide equally distanced categories: 3 point for impact and 5 point for originality. These sets distinguish between five possible configurations in the case of originality. The second ordinal scale at this stage is the impact of formalities.

Some of the essential information cannot be grouped but is nonetheless essential, for example the ownership rules. Here, this kind of data remains binary. At the end of this stage, all of the policies have been transformed into directly comparable values, each form one of four possible data types: count; value; 3 or 5 point equidistance ordinal-interval scale. In addition to this, some information remains binary.

Summary

In sum, the first part of the methodology focuses on making the copyright policies of the individual case studies directly comparable. To do this, a common terminology is applied to the provisions, turning the qualitative information into binary data. In addition and in the second step then, these provisions are recoded according to their underlying purpose. The binary data is turned into variables of copyright policy as the values become numerical. In conclusion, the data now has two levels. The first one is the general numerical values which reflect the substantive protection by copyright area. The second one is the binary data which represents the detailed substantive provisions in a comparable manner.

3.1.2 Copyright Stringency

Stringency is the degree of government intervention to provide protection to copyright owners. As a result, legislation which benefits copyright owners increases the level of stringency while those benefitting the users decrease it.

Designing the Stringency Index

There is no independent measure of copyright stringency. As a result, this thesis relies on a composite index of stringency which combines the core features into a single measure. The index is based on six individual areas. For each of these, provisions strengthening protection were weighted against those weakening it. For example, economic rights benefit copyright owns and therefore raise the level of protection. Exemptions on the other hand reduce it because they benefit users at the expense of the owners.

The first area is the threshold of protection which summarises the preconditions a work has to meet to benefit from protection. The next three areas cover particular work types: copyrighted works, neighbouring right works and the Performers. For each of these, the scope of protection is assessed. The fifth area is

moral rights and therefore the scope of the author's protection as distinct from the copyright owners. Finally, the sixth area focuses on the overall enforcement capabilities. In sum, at the end of this stage, the different areas of stringency have been conceptualised and the particular variables have been selected.

Normalisation

The variables from the second stage by themselves do indicate stringency. For example, protecting four kinds of works is more stringent than protecting only two. A wider range of works can benefit from protection and therefore more copyright owners are the result. However, the different areas of protection cannot be combined because the units and nature of the individual variables differs. They have to be normalised first: transformed into the same unit. Normalisation here is on the basis of the base year 1880. This base year value reflects the average provisions for each variable in Germany, the US and the UK at this point in time. Therefore, each variable, for each point in time is divided by this year and provision. This provides a normalised index value which can then be combined in the calculations.

Calculation

In this stage, the normalised variables are aggregated according to the areas of stringency (Designing the Stringency Index). The results for these individual areas are then also added up to arrive at an overall score for the level of stringency a case study has in comparison to the average provisions that Germany, the US and the UK had in 1880.

Summary

In conclusion, to determine the level of stringency of particular copyright systems, its core components have to be combined. Copyright systems are broken down into six distinct areas, each with a different focus in what kind it protects. For each of these, the relevant variables are combined once they have been normalised to the base year 1880. The individual area values are then combined to arrive at an overall index score for stringency.

3.1.3 The Culture of Copyright Systems

Independently of stringency, this thesis also examines the approach to the copyright issue: its copyright culture. At this stage, the data on the case studies is available in a directly comparable form (Processing the Data). However, to determine how the provisions link to the copyright approach, here termed copyright culture, they have to be linked to theory. The literature identifies two approaches in the Western World to how copyright is protected. The first one is the Common Law approach (CL) where the emphasis is on the public benefit of copyright in the form of the incentive to create. The second way is the (continental) civil law understanding termed the Author Rights approach (AR) in which the personality of the author is paramount. These two systems are assumed to show marked differences, occupying opposite positions on a range of issues. Although they do not exist in their ideal forms, they are used here to define the possible range of cultural positions that a copyright policy can take. They serve as external benchmarks to which policies can be systematically compared.

The following section will demonstrate how the binary data and the variables based on it from the different case studies are turned into a cultural score. The process has three stages. First, the ideal types are specified and 11 individual dimensions on which they differ are identified. For each of these, the distance between the ideal types is divided into five intervals. In addition, the appropriate variables which reflect the dimensions' content are selected. Secondly then, all the required variables are

placed on the same scale. Then, the calculations are carried out by combining the variables according to the ideal type outline. The individual areas are combined to determine the overall cultural position of the copyright policy.

Designing the Ideal Types

The AR and CL systems in their ideal type form show strong and clearly identifiable differences in 11 separate dimensions. These range from how they handle neighbouring rights to the role of formalities. To assess these dimensions, the provisions which can shed light on particular areas need to be identified. For example, the role of formalities is determined by two aspects: the number of formalities there are and what kind of impact they have. Combining these two components will show the overall role formalities play. The actual number of variables used to calculate the dimensions varies from one to 13. At the end of this it is clear what provisions are necessary for each dimension and how these link to AR and CL.

Classification

The variables and binary data from the Processing the Data stage represent the substance of the policies. However, they are not representative of its cultural approach on their own. The cultural differences between AR and CL systems are expressed here in a 5 point discrete scale where 1 represents the ideal CL copyright system and 5 the ideal type AR system. The mid-point 3 represents neutrality and is used if a feature is tilting neither towards CL nor AR. To link the cultural predictions of the ideal types to the individual variables, each one of them has to be classified in this respect. For example, strong moral rights protection is seen as a sign of AR systems. Therefore strong provisions would be classified as a 5 here. On the other hand, strong exemptions are predicted as typical for CL. Extensive provisions in this area would therefore be classified as 1 (the CL ideal type). The meaning of strong and weak is

determined in relation to the overall sample. For every variable established at stage two, the values are now classified.

In addition to classifying already existing variables, the qualitative information represented in the binary data set is used to create additional culture variables. For example, one expected difference between AR and CL systems is the transferability of the copyright. In an ideal AR system, strong protection for the author in form of assignable rights and guaranteed extensive remunerations exist. On the other hand, CL systems would not provide any limits to ensure that works are as economically exploitable as possible. The variable here would therefore be based on the qualitative information: if there are limits; if rights are guaranteed and the presence of unwaivable remuneration rights among others. Each distinction of the spectrum is outlined by a clear definition, dividing the scale into 5 equidistance intervals. The result is that all the variable level data is placed on the discrete 5 point spectrum. At the end of this stage, all variables are 5 point ordinal interval variables.

Calculation

In the final (fifth stage) then, the classified variables and the substantive binary data necessary to determine the 11 individual dimensions are combined and final score is calculated. This final score represents the position of a particular copyright system at a particular point in time. Due to the calculations, continuous five point scales.

Summary

In summary, to determine how a copyright system approaches copyright protection, it is compared to ideal CL and AR types. These ideal types are external benchmarks for comparison and vary on 11 separate points. Each of these in turn is subdivided into five distinguishable and clearly defined categories. The systematic differences are reflected in the individual variables which are classified on the 5 point spectrum accordingly. To determine how a particular policy compares to each of these areas, the relevant variables are combined. The final position is the result of combining the individual dimension scores. The outcome represents the relative position of a copyright policy compared to the ideal AR and CL type and is independent of its evolution in terms of the level of protection

3.1.4 Summary

This section has provided a short overview of the complete methodology from coding the data, to processing it into variables and then using the data to calculate stringency and culture. The next parts will now outline the individual stages in detail. The first part will focus on making the data comparable. The second section then focuses on stringency. The final part then is culture. Each of these parts concludes with a demonstration to provide an illustration of how the methodology works in practice. A useful example has to be comprehensive enough to show how the technique works. Nonetheless, it also has to be limited in scope to prevent unnecessary complexity which would limit the clarity of explanation. The chosen example here is the Statute of Anne because it is comprehensive enough to be considered a copyright policy while also short enough to allow for a clear explanation of the methodology. Therefore, all three sections will be applied to the Statute of Anne.

4. Making Copyright Systems Comparable

4.1 Introduction

To trace the evolution of copyright polices across time and countries, it is vital to ensure the comparability of provisions. This section outlines how the copyright policies of the individual case studies were transposed into directly comparable data. The discussion will first emphasise the scope of the investigation: the components of copyright, the kinds of sources used, the case studies as well as the timeframe examined. It will then provide a detailed discussion of the coding schedule, clearly outlining the definitions used for the different areas under consideration. The second part then focuses on how this data was transformed into numerical variables, providing quantitative information on the different policy areas. The discussion will be illustrated using a simple example: the Statute of Anne.

4.1.1 Establishing the Scope of the Data Set

A number of prerequisites have to be discussed to ensure the comparability of the outcome. First, the kinds of sources which are to be included in the coding process have to be clarified. As mentioned above, copyright protection is largely statute based and therefore these constitute one source. However, they are not the only the relevant policy source. The case law also needs to be examined for changes, for example the granting of the rights or exemptions. Finally, the letter of the law and its interpretation in practice may vary. It is therefore essential to refer back to secondary sources, especially legal commentaries when the substance of the policy is determined.

Secondly, the selection of case studies needs to be reiterated. This study seeks to explain the evolution of copyright policies. The chosen case studies are for Europe: the UK, Germany and the EU. In addition, the US is included as a non-EU country with significant political clout. This provides for a common law country, a civil law country and the regional level. The timeframe ranges from 1880 until 2010 whereby the state

of the copyright policy is assessed every 10 years (cut-off point is the 31 December of the relevant year) for all case studies to make the results comparable. However, it should be noted that this also means that some developments appear later in the data than they actually were. For example, the 1911 UK Copyright Act is only going to feature in the analysis from 1920 onwards.

At this stage, the boundaries of what is examined have been established. It is now necessary to look at the individual components of the dataset.

4.2 The Data Set

It is clear from the primary and secondary sources that terminology is a major issue for comparing copyright policies across the case studies. The names given to features vary across countries not only in terminology but also content. This means that the terms used in the legislation cannot be used one-to-one in coding the laws. Rather, the coding schedule had to be based on independent definitions. The solution adopted here was to break down the existing terms into their smallest distinguishable unit. This means that all the information could be recorded as precisely as possible and in a comparable manner. These do not necessarily overlap with the terms used in the countries-otherwise comparability could not be ensured. As a result, the coding schedule ensured that the coding was done entirely for content rather than label.

4.2.1 The Different Areas of Copyright and Their Coding Definitions

To assess copyright, a wide range of aspects have to be considered and therefore coded for. The following section will discuss these in detail. These will now be outlined in detail, presenting the individual components of the coding schedule. The first part will focus on general provisions. The second section then moves on to substantive rights granted to copyright owners and authors. The third area then outlines the exemptions and their conditions. The fifth part centres on enforcement and finally, the protection of foreigners is examined.

4.2.2 General provisions

In this part, general considerations are considered. These are mainly the order of provisions in the particular legislation, the justifications stated for providing copyright protection as well as the prerequisites (formalities, originality levels) which have to be met.

Act Structure

The general outline of the particular act can be relevant in the analysis. It is assumed that the order of sections is a reflection of the importance attributed to them (S. von Lewinski 2008: 41, 51, 62-63). The sections were recorded in their order, with '1' assigned to the one appearing first; '2' for the second one and so on. The following section are distinguished[24]

Section	Content
Definitions	• List of definitions
Economic Rights	• Section providing information on what particular uses are restricted
Exemptions	• Section providing information on situations where copyright cannot be enforced
Foreign Works	• Provisions covering foreign authors and their works
Formalities	• Section providing information on existing formalities and their impact
Moral Rights	• Section providing information on what author interests are protected vis-à-vis the copyright owner
Neighbouring Rights	• Section providing information on the protection of neighbouring rights (broadcasts and sound recordings)

Table 2: Coding schedule for sections which can be present in an act.

[24] Based on the AR-CL differences, see 7.2.1 Act Structure.

Performers	• Section providing information on the protection of Performers
Sanctions	• Section providing information on the enforcement provisions
Term	• Terms of Protection
Transfer	• Transfer Provisions • For example limits on assignability

Table 2: Coding schedule for sections which can be present in an act.

The Justifications

The first substantive area under consideration is the stated justifications for legislating. To this end, the particular justifications named in the legislations were coded. These vary significantly and include international pressures, economic benefits but also specific reasons such as implementing EU legislation. It should be noted that this section only includes those justifications explicitly stated in the legal provisions.[25]

Justification	**Content**
Codification	• Legislation aims to codify existing law, especially to streamlining it
Competition	• Legislation will enhance the competitiveness of the country
Constitution	• Legislation is a constitutional requirement • For example: effect of rulings by a constitutional court
Economic Benefit	• Legislation is designed to improve the economic benefit derived from copyright policy • Can be aimed at any interested party
EU Obligation	• Legislation is required by EU Law
International Obligations	• Implementation/ transposition of an international (non-EU) agreement

Table 3: Coding schedule for explicitly stated justifications.

[25] This is not the same as cultural justifications which forms part of the culture dimensions, see The Justifications.

International Importance	• Target of reform has been gaining in international recognition and spread as a result • Catching up with a (perceived) international consensus
Legal Certainty	• Legislation aims to ensure that the principle of legal certainty is met
Labour	• Author has used his labour to create the work and therefore deserves to benefit from it
Member States	• Legislation is designed to appeal to a wider range of potential member states • Only applicable to international agreements, conventions or unions
National Interest	• Legislation aims to further the national interest
National Reputation	• Legislation is required to enhance/ protect the international reputation of a country
Needs of the Author	• Legislation will ensure that the particular needs of the author are met • Needs can have economic and moral rights dimension
Personality	• The work reflects the personality of the author which gives him the right to control it
Piracy	• Harm caused by domestic and international piracy requires legislation
Preparatory Work for Boarder Protection	• Partial reform intended to establish the prerequisites for further reform
Technical Changes	• Update existing legislation to new technological reality
Single European Market (SEM)	• Legislation will implement the SEM in particular • Only relevant for EU member states
Trade	• Legislation will increase the potential for trade
Utilitarianism	• Legislation is designed to provide an incentive to create and disseminate works for the public benefit

Table 3: Coding schedule for explicitly stated justifications.

Copyright Requirements

To benefit from copyright protection, a work has to comply with two sets of formalities. The first one is the minimum level of originality required to qualify for copyright protection. This only applies to copyright works. NR are by definition mechanical works and therefore not original. The literature on copyright policy uses three terms to describe originality thresholds. The first one is the 'sweat of the brow' (based on Locke) which is understood to mean that labour alone is sufficient and no explicit originality is required to gain protection. This in line with the UK's early approach as exemplified in *Walter v Lane* (Walter v Lane 1900). In the US, the *Bleistein* decision reflects this kind of approach: it refers to a requirement that the work is not copied (D. Zimmerman 2006).

The second term is judgement. This refers to a requirement of some although rather limited originality. The author must put in some effort which cannot be described as pure labour.[26] For this reason, German law distinguished between different kinds of photographs and films. It provided a higher level of protection if these were considered to be original rather than just the result of a technological process.[27] Harke refers to non-industrial and average which makes it difficult for example to gain protection for very short texts (D. Harke 2001: 14- 17).

Finally, especially continental systems, the term used is 'creativity' which refers to a high level of originality in the sense that the author's personality is reflected in the work (J. Wiefels 1962: 122). A German case in 1898 did explicitly state that even letters may not be of sufficiently creative to justify protection, especially if the content only referred to news and similar items (1898: 49). Similarly, by 1908 it was decided that individual creative works, here also referring to letters, were protected (1908: 404).

[26] Examples here are the *Feist* decision in the US (Feist Publications, Inc. v Rural Telephone Service Company, Inc. 1991).

[27] For example, the 1965 Urheberrechtsgesetz still distinguished between original photographs which are protected under §2 and mechanical ones under §72, despite in essence providing the same level of protection for both.

The German courts have also highlighted that judgement alone is not sufficient (1928: 358).

These categories are blurred in practice and so intermediate steps were also considered. Each category shows an increase in the level of originality required and is based on an equal distance between them. In the coding process, these categories were not treated as mutually exclusive but rather if a source referred to the originality level, all of these statements were recorded to not overly rely on a potential minority opinion.[28]

Originality level	**Content**
None	• 'Sweat of the Brow' • Requires that the work is not copied
Low	• Largely relies on skill and labour • Some minor judgement/ individuality is necessary when the work is made
Some individuality	• Judgement needs to be identifiable in the work • skill and labour are not enough but creativity is not needed
Reflect part of the author's personality	• The work has to show judgement combined with some limited creativity • some author personality is necessary
Reflect the author's personality (creativity)	• Protection only granted if creativity, reflecting the personality of the author, is identifiable in the work

Table 4: Coding schedule for the level of originality.

[28] In cases where no agreement could be identified, all alternatives were recorded and then included in alternative calculations (see Appendix 2).

The second kind of formalities is administrative. Administrative formalities were coded for by listing all the formalities which have been included in the legislation during the relevant timeframe.

Formality type	**Content**
Registry	• A work has to be registered in a central register
Deposit	• Copies of the work have to be deposited with specified libraries/ institutions
Tangible medium	• The work has to be expressed in a tangible medium
Name	• Name of copyright owner and/ or rights reserved appear on the title page
Manufacturing clause	• The work has to be manufactured in a certain place • refers here to the US
Continued adherence to Berne	• Protection is only granted if the state continues to adhere to the Berne convention • refers to the special clause in the UCC

Table 5: Coding schedule for administrative formalities.

In addition, the effect the formalities have on the subsistence and enforcement was also recorded. It distinguishes between formalities as a precondition; formalities as relevant for enforcement only; and formalities have no effect in practice. It is very important at this point to be clear which formality had which impact. It is possible that the registration of the work is necessary to achieve copyright while the deposit has no

impact at all despite giving rise to a fine only.[29] To assess the importance of formalities, distinctions like these need to be included.

Provision	Definition
1	• formalities are constitutive
2	• formalities are always affecting enforcement • no constitutive effect
3	• No effect of formalities

Table 6: Coding schedule for the impact of formalities.

4.2.3 Protection of Authors and Copyright Owners

In the second part, the focus moves to the substantive protection of work types. This includes which types are protected and who benefits from their protection (ownership rules), depending on the circumstances in which they are created. It then describes the economic rights which can be provided for as and to what extent these can be assigned to other parties. In addition to the economic rights, the moral rights which protect the authors' interest against any other interested party are considered.

Work Types

The information of the legislation was coded according to work type. To make the comparison as accurate as possible, every significant distinction drawn between works from 1880 to 2010 is reflected within it. A few things have to be noted though. Firstly, the terms literature work and art work have always been broad and subcategories exist. In order to keep the comparisons meaningful and not get lost in complexity, it was decided that representative work types will be used: those having gained protection first. As a result, literature works are represented by books (meaning texts) and art works by paintings. Having said this, controversial later additions which

[29] One example is the difference between the UK and the US. In the US, the formalities were a precondition for copyright to exist in the first place. In the UK after 1880, however, compliance with formalities had no impact on the existence of copyright as such although it did affect its enforcement. By 1920, compliance with formalities had no actual impact at all.

happened in the period studied were added as separate work types such as computer programs and original databases.

In summary, the following categories were established:

Copyright works	Literature work: text	• Any expression which takes the shape of a text • traditionally referred to as a book
	Literature work: computer program	• The source code of a computer program
	Literature work: original database	• A databases which is able to cross the minimum originality threshold.
	Dramatic work	• A drama in any form.
	Musical compositions	• A musical composition a in any form • Traditionally considered to be sheet music
	Art works: painting	• The protection granted to an artistic work • exemplified here by a painting
	Film	• Protection given to a film as such rather than the underlying work expressed in it
	Photographs: high originality	• Photographs which fulfil the minimum originality requirement

Table 7: Coding schedule for work types.

	Photograph: low originality	• Photograph which does not reflect originality
Neighbouring rights/ rights related to copyright	Sound recording	• The protection granted to the producer of a sound recording for the recording itself
	Broadcast	• The protection granted to the producer of a broadcast for the broadcast itself
Rights akin to copyright	Database: *sui generis*	• Protection granted to unoriginal databases on the basis of investment
	Performers	• Protection granted to a Performer in relation to his performances of a work

Table 7: Coding schedule for work types.

Secondly, it is important to distinguish between the work type protected and the right to control a use of this work. Although this might sound obvious, overlapping terms can cause significant confusion here. For example, authors can have the right to control the broadcasting of a work. The protected item remains the underlying work and protection is granted against the activity of broadcasting. However, the work type broadcast refers to the broadcast as the item of protection and the ownership lies with the (legal) person being in charge of making the broadcast. Here, the broadcasting activity is protected in addition. This is important because the dates at which the

broadcasting activity gained protection compared to the broadcast as an item tends to be significantly earlier.[30]

For each of the work types, the first ownership was included. These refer to who owns the copyright by default, especially if it lies automatically with the author or not. The distinction is between the author and employer. The situation in which a work is created is important: it determines the relationship between the author and the work and therefore also the employer. This information is relevant later on in the analysis.

Creation situation	**Content**
Joint work	• The work was created by more than one author and their contributions *cannot* be distinguished from each other
Collective work	• Refers to a work which was created by more than one author and the contributions *can* be distinguished
Contributions to collective works	• Refers to the copyright in the specific contribution which was created with the intent of forming part of a collective work
Anonymous/ pseudonymous works	• (Real) name of the author of the work is not known

Table 8: Coding schedule for the relationship between a work and the author.

The Rights

The next area under consideration is the particular uses of a work which are protected by copyright policy. These economic rights have been broken down into their smallest possible components and listed separately.

[30] The right to control broadcasting was established in the Germany in by the court ((1926) RGZ 113 p. 413). However, broadcasts themselves only gained protection in the 1965 Urheberrechtsgesetz.

This chapter aims to track the development of copyright and therefore, the rights will be treated as separate even though they might not be listed as such any more in the law or the relevant commentaries. It is the substance which counts, not the label. As a result, although adaptation right includes the translation of a work in modern copyright law, it will be treated as separate here due to the historical dimension. Similarly, although Internet access to a work is conceptually part of the communication to the public, not all countries necessarily have it automatically included. Therefore, the making accessible on the Internet is listed independently as well. The same applies to the splitting of the performance right into 1) performance as such, meaning by a person or group in front of the audience; 2) performance using a technical instrument in front of an audience, especially a sound recording and 3) performance via technical equipment and transmitted live to a (limited) distant audience, for example with a screen and loudspeakers to the outside of the room where the performance occurs.[31] On the other hand, not all rights are logically available to all kind of works. For example, there is little copyright relevant meaning in exhibiting a literature work because the copyright relevant essence of the work is the expression and therefore the wording rather than the material object as such. Finally, the right to extract and re-utilize data only applies to databases which are protected based on their investment value rather than creative merit (*sui generis* databases[32]).

[31] The third right is different from broadcasting in that the transmission distance is limited: it refers to the broadening of the audience for a live performance by other means than broadcasts.

[32] Sui generis databases differ from other databases protected under copyright that they are not considered original but still beneficial to the public. So, to ensure a return in investment, they get a special kind of protection which is shorter in term and less expansive in scope than databases qualifying for normal copyright protection.

Economic right	Content
Reproduction	• Right to reproduce a work in a tangible form, both analogue and digital • irrespective how these are made or in what shape the reproduction takes
Distribution right	• Right to make a work publicly available by the sale or transfer of ownership of a tangible copy or the original
Fixation right	• Reproduce oral work or performance in a tangible medium
Exhibition right	• Right to exhibit a tangible copy of a work in public
Rental/ Lending right	• Right to borrow a tangible copy of a work • Renting refers to commercial nature • Lending is non-commercial
Adaptation right	• Right to prevent the alteration of a work's expression • For example: dramatization of a novel
Translation right	• Right to control the translation of a work into other languages.
Performance/ Recitation right	• Right to control the performance of a work in public by a natural person • The audience is present during the performance
Performance via a technical instrument	• Right to control the performance of a work in public • The audience is present but the performance is done by a technical instrument, especially a sound recording
Performance via technical equipment	• Right to control a performance in public • Uses technical equipment to transmit the performance live to a (limited) distant audience • For example with a screen and loudspeakers to the outside of the room where the performance takes place

Table 9: Coding schedule for economic rights.

Communication to the public right	• Right to control the transmission of a work to a distant place • Excludes broadcasting
Broadcasting right	• Right to broadcast a work by the means of wireless transmission
Retransmission right	• Right to control the retransmission of a broadcast by both wired and wireless means
Making accessible	• Right to control if a work is made accessible on the Internet.
Extract and reutilization right	• Describes the use of a database • Only applies to *sui generis* databases

Table 9: Coding schedule for economic rights.

The term of protection was also recorded. Special attention was paid to the circumstances of creation. For example, the term can vary depending on if it made for hire or not. In this area, there was a specific issue related to the US legislative style. The US statute uses broad terms for the rights and these are expanded by the courts to include new meanings. The points of these inclusions are largely clear except for the 'Making Accessible' right. It is very hard to pinpoint the introduction of this right as it is an expansion of the reproduction right. My solution here was to include it from 2000 onwards for a number of reasons. Firstly, dating it back to the actual introduction of the broad term (reproduction) right would date it back to 1976 and therefore before the Internet was thought of in a modern way. Secondly, court cases affecting the infringement of copyright on the Internet first appear in the 1990s. Thirdly, the WCT which includes the right explicitly was transposed into US law with the 1998 Digital Millennium Act. The conclusion was therefore that it was introduced at some points in the 1990s.

In addition to the existing rights, it was also recorded to what extent they are transferable. In some cases, limitations applied when particular assignments were explicitly prohibited. The provisions here covered the followed non-exclusive distinctions:

Transferability	Content
Fully Transferable	• There are no limitations on the what the owner can assign
Only by Will	• The right can only be passed on after the death of the author as part of the estate
Expropriation	• The copyright can be expropriated, for example in cases of debt
State Ownership	• The right will be inherited by the state if no heir can be found

Table 10: Coding schedule for the transferability of rights.

Moral Rights

Outside of economic rights, moral rights were also coded for. The term author here reflects the creator of the protected work as distinct from the copyright owner. It can therefore be an author, artist or a performer, depending on the specific work in question. However, it cannot be a corporation or similar entity. Like with the economic rights, the terms used in the particular policies were broken down into their smallest components.

Moral right	Content
Positive paternity	• The right of the author to be named as such.
Negative paternity	• The right to not have a work attributed to an author.
Integrity	• The right of the author to prevent actions which compromise the integrity of the work • For example alterations
First Publication	• The right of the author to control the first publication of the work • Publication refers to making it available to the public in whatever way

Table 11: Coding schedule for moral rights.

Remuneration	• The right of the author to be adequately compensated when his work is used
Resale	• The right of the author to benefit from increases in a work's value if it is resold • Mainly applies to art work
Access	• The right of the author to have access to a work after the transfer of ownership of the physical copy
Participation	• The right of the author to demand more remuneration if the original contract does not reflect a rise in value of the work.
Withdrawal based on a change in attitude	• The right of the author to withdraw a work because it does not reflect his attitudes anymore
Withdrawal based on non-exercise of the rights assigned	• The right of the author to withdraw the copyright on the basis that the assignee has not exercised the right
Fixation	• The right of the author to not have his work fixed in a tangible form without his consent
Privacy/ Portrait	• The right of the person pictured in a portrait or being reflected in a work to prevent certain actions on the basis that this is relevant to his privacy

Table 11: Coding schedule for moral rights.

In addition to the moral rights, the term of protection for these was also recorded.

4.2.4 Protection of Users

The Exemptions

In the third part, the focus moves away from the protection of the owners/ authors to the users. The possible exemptions as well as the particular conditions which can apply to them are coded. Like with the rights themselves, the distinction is between exemptions for economic rights (CR, NR and Performer) but also additional ones for Performers and for moral rights.

Exemptions for Economic Rights

Of all areas in copyright policy, determining the exact shape of an exemption affecting economic rights has been the most complex task. Not only does terminology vary across countries, their applicability and conditions vary according to work types. As a result, the main aim of the coding was to reduce this complexity and make them comparable across case studies. To this end, exemptions were recorded according to their specific purposes. The act sections especially often provide for several separate occasions in which an exemption can be claimed for different reasons. One example are the library exemptions which range from copying an unpublished manuscript, to copying and distributing a scientific article to lending a work. These activities are exempt for different reasons and have different conditions attached to them. As a result, they are treated separately here but as similar as possible across the different case studies. This also means that a section in the specific act can be congruent with an exemption listed here but not necessarily so.

When coding for exemptions, it is essential to also compare the infringement side with the rights to identify where hidden exemptions exist. For example, even though a right to perform exists, it is possible that only public performances constitute infringement. Therefore, non-commercial (private) performances are exempt from

copyright.[33] The list of exemptions is therefore a mixture of listed exemptions, case law and infringement considerations.

The following table summarises all of the exemptions (in alphabetical order):

Exemption Purpose	Content
3 Step Test	• Explicit reproduction of the Berne 3 step test • Conditions are listed under General Limits/ Conditions in the conditions part of the coding schedule
Abstract	• Making an abstract of a work
Archiving	• Making complete copies for the purpose of including them in an archive
Back up	• Allows to make a backup copy
Catalogue	• Use of a work by including it in a catalogue
Circumvention	• Break the anti-copying mechanism
Coin-Operated Machines	• Using a work in relation to coin-operated machines
Coin-Operated Machines (Games)	• Using of a work in coin-operated gaming machines
Compilations/ Collective Work	• Purpose of creating a compilation which includes a variety of different works
Compliance with Berne	• Include exemptions by reference to Berne
Compliance with Rome	• Include exemptions by reference to Rome

Table 12: Coding schedule for economic right exemptions.

[33] This has been the case for example in the US for the performance of musical works in the 1909 and 1947 Copyright Acts.

Copyright Equivalent/ General Exemption	• Same scope of exemptions apply to these works as they do for standard copyright protected works • Used for NR and Performers
Correct Errors	• Correct errors in a computer program
Criticism/ Review	• Purpose of criticizing or reviewing a work
De-Compilation	• Reversing high-level code into machine accessible code
De Minimis	• Some minor use is allowed
Derogation from Grant	• Use copyright in such a way that it amounts to abuse • For example refusal to publish by heirs
Developing Countries	• Use of a work only available to countries with developing country status
Digital Audio Transmission	• Using a work in connection with digital audio transmission
Disability	• Make works accessible in special formats to enable disabled people to have access to them
Encryption Research	• Purpose of understanding any encryption mechanisms
Ephemeral Recordings	• Allows a broadcaster to make copies in relation to the broadcasting activity
EU	• Limits on copyright due to EU requirements
Exemptions Manufacturing Clause	• Exemptions to the requirement that copies need to be manufactured within a country
Exhaustion of the Right	• After a work is sold, certain rights granted do not apply anymore

Table 12: Coding schedule for economic right exemptions.

Expiry Assumption	• Defines time periods were it is reasonable to assume that copyright has expired • Relevant when copyright owners unexpectedly appear
Fair Use/ Creating an Independent Work	• Create a new work which qualifies for copyright itself • Transformative use
Folk Song	• Use a work is possible because it is a folksong
Foreign Language/ Foreign Country	• Works written in a foreign language are not subject to all copyright provisions
Government/ Public Institutions or Charity Use	• Exemptions granted for actions by these kind of institutions because these are understood to serve the broader public good
Incidental Inclusion	• Incidental inclusion of work within another kind of work
Inclusion in Scientific Article	• Inclusion of a work in a scientific article
Interim Copyright	• Grant of copyright to a work for a set period to allow for the compliance with formalities
Lawful Use	• Lawful use of the work does not cause infringement
Legal Requirement	• Statutory duty necessitates the infringing action
Library: Back-up Copy	• Copy a complete work to replace another one
Library: Copy a Work	• Allows the library to copy a work for a third person
Library: Copy an Digital Work	• Allows library to make digital copies of a work
Library: Copy from Internet	• Allows libraries to copy works available on the Internet

Table 12: Coding schedule for economic right exemptions.

Library: Copy Unpublished Manuscript	• Library can make a copy of an unpublished manuscript
Library: Exhibition Catalogue	• Allows libraries to copy works for the purpose of using them in exhibition catalogues
Library: Export	• Make complete copy of a work before the original is exported
Library: Final Years	• Library activities permissible during the final years of copyright protection
Library: Import	• Allows for the import of copyrighted works by and for the use of libraries
Library: Interlibrary Exchange	• Copy a work to distribute the copy to another library
Library: Make Work Accessible Digitally	• Allows library to copy a work and make the copy accessible digitally
Library: Rent/ Lend	• Exemption covering the rental and lending rights
Manufacture Sound Recording/ Compulsory License	• Manufacturers of sound recordings can make copies of a work in return for a fee
Minor Import	• Exemption to import restrictions based on the small quantity of works imported
News	• Use works in news reporting
Non-commercial Broadcasting	• Use works in certain types of public broadcasting
Out of Print	• Copy a work if it is out of print
Paper Reproduction	• Reproducing a work on paper rather than digitally
Parody	• Allows to use a work in a parody
Political Speeches	• Use of the work is permitted because it is a political speeches

Table 12: Coding schedule for economic right exemptions.

Privacy/ Personal Information	• Works cannot be used if privacy or personal information issues are affected
Private Study	• Purpose of private study
Private Use	• Private use of a work
Public Place	• The work copied is situated in a public place
Public Recitation	• Public recitation of a work
Public Safety/ Judicial Proceedings	• Use a work in relation to judicial enforcement or other security related activities
Quote	• Quote parts of a work in another work
Religion	• Use of a work by a church or in the course of worship
Rental	• Uses in the course of a rental activity
Rental Right Transferal Assumption/ Compulsory License for Rental	• Rental right is assumed to have been transferred in certain cases
Repair	• Use the work in the repair of technical equipment
Research	• Use a work in the course of research activities
Restricted Term/ Right	• Certain rights have not the standard term of protection
Retransmission	• Exemptions to retransmission rights
Reverse Engineering	• Copy a work in an attempt to understand its workings with the goal of creating an independent work
Right Assertion Requirement	• Right is not in effect unless it has been asserted

Table 12: Coding schedule for economic right exemptions.

Sale	• Use of a work with the aim of selling it
Special Broadcasting	• Broadcasting by certain types of institutions and for limited (not public) uses only
Subsequent Work	• Use a work to create related works
Teaching Performance	• Performance of a work in the course of a teaching
Teaching: Classroom Instruction	• Use works in the course of teaching activities
Teaching: Classroom Instruction-Make Accessible Online	• Use works in the course of teaching activities by giving students access to the works online
Teaching: Exam	• Use a work for the purpose of examinations
Teaching: Import	• Import a work by and for the use of educational establishments
Teaching: Make Broadcast/ Transmission	• Use a work in a school broadcast or transmission
Teaching: Make Photocopy	• Make photocopies of works for use in teaching activities
Teaching: Performance	• Perform a work (including via mechanical instruments or technical equipment)
Teaching: Record Broadcast/ Transmission	• Copy a broadcast/ transmission to use in teaching activities
Teaching: Rental/ Lending	• Exemption for educational establishments to the lending and rental rights
Teaching: Textbook	• Use works in textbooks

Table 12: Coding schedule for economic right exemptions.

Technical Necessity	• Works are copied in the course of a technical process which is necessary to the lawful use of the work
Temporary Reproduction	• Making a temporary copy of a work
Unpublished Manuscript	• Make complete copies of unpublished manuscripts

Table 12: Coding schedule for economic right exemptions.

For each of the exemptions, a number of different characteristics were recorded. Not all work types are subject to the same rights and exemptions. Therefore, the type of work subject to the exemption is also recorded. Secondly, the economic rights which are affected by it. However, not every exemption explicitly lists the right it affects. So, it can be necessary to deduce the rights affected by the purpose of the exemption or the specific conditions which apply.

Exemption Conditions

Another issue with exemptions relates to the conditions which apply to them. They tend to be very detailed and complex. To allow for comparison across case studies, the conditions applicable to the different exemptions have been standardized and generalized according to their nature. For example, if a work can only be accessed in electronic form in a certain building, for two years and only at 5 computer simultaneously, the actual restrictions are: time (two years), territorial (only in the building) and in the number of copies (5 at any time). In addition, conditions have been recoded according to their underlying motive.

To determine the focus of the exemption, the emphasis has to be on the impact any conditions has in practice. The first group includes those conditions which protect the author's interest as an author. These are essentially non-economic conditions. Secondly, conditions can limit the extent to which a work is distributed, limiting the circulation of copies made under an exemption. Thirdly, the copying of the

work itself can be restricted, termed here 'limited scope'. Fourthly, some exemptions have conditions attached which are designed to ensure the compensation of the rights owner (remuneration). In the next group, conditions are summarized which limit the uses of a work under a specific exemption. Conditions can also be grouped by the actor/ procedural limits. Here, how an exemption is exploited and by whom is important. Finally, there are conditions which describe general limits. The following table illustrates the meaning of these categories in addition to defining the content of the specific conditions as they apply to economic rights.

Group	**Condition**	**Content**
Author interest	Name and source	• The name of the author and/or the source from where the extract was taken has to be indicated
	Consent required	• Author has to be asked and actively agree to the use
	No recall for changed attitudes	• Work cannot have been recalled from circulation on the basis that the author's attitudes have changed
Limited distribution	Limited public	• The circle of people that benefit from the use of the work is limited by specific criteria • not public use
	Number of copies	• Number of copies which can be made is restricted
	©-note (prevent further spread)	• Every copy made under the exemption has to carry the ©-note to make sure that further use can infringe
	Territorial limit	• Exemption carries specific territorial restrictions

Table 13: Coding schedule for exemption conditions.

Limited scope	Nature of the work	• Exemption only applies if the copyrighted work matches certain criteria • For example a school textbook
	Time limit	• Exemption applies only within or after a specific time period
	No assertion	• Exemption only applies if the attacked rights owner has not asserted the affected right
	Right not exercised	• Exemption only applies if the right is not actively exercised
	Information/ format not available	• The information/ format sought under the exemption cannot be available prior to the exemption being used
	Only necessary parts	• The copying/ use itself is restricted to those parts of the work which can be justified directly by the exemption
	Incidental/ part of the technical process	• Infringement is a by-product of another (lawful) activity
	Published	• The work must have been published before the exemption is invoked
	License prevails	• Exemption does not apply if a license agreement exists and prohibits the activity
Compensation	Remuneration	• The right owner has to be compensated for the exempt use
	No commercial advantage	• The use cannot be commercial

Table 13: Coding schedule for exemption conditions.

	Compulsory license	• Exemption allows for commercial use of a work in return for compensation
	Declare intent	• The intent to use an exemption has to be declared beforehand • Either to author or a central organization
	Collection society only	• Compensation claims can only be exercised by a collecting society
	Arbitration	• If no agreement on the terms of use can be found, arbitration is required
Use	No modification	• The work cannot be altered
	Very limited/ highly specific use only	• Exemption only applies for a very specific use
	Lawful use/ copy	• Exemption only applies if a lawful copy is used and/or the general activity is lawful
	Create independent work	• Transformative use is required
	Several authors	• Works from several authors have to be used
	Own copy	• The person relying on the exemption has to own the copy used
Actor/ procedure	Doing it yourself	• Only the person relying on the exemption can carry out the activities it entails
	Lawful user	• The user has to be allowed to use a work
	By one person	• Exemption only applies if it is carried out by only one person

Table 13: Coding schedule for exemption conditions.

	Reproduction method	• Exemption only applies if certain reproduction methods are used
	Circumvention measure	• Exemption includes removing the DRM
	Nature of the institutions	• The nature of the institution relying on the exemption has to match certain criteria
General limit	Special cases	• Exemption only applies in special cases • Berne criterion 1
	Normal exploitation guaranteed	• Exemption does not interfere with the regular market of a work • Berne criterion 2
	No unreasonable prejudice	• The impact created by the exemption is not overly costly for the rights owner • Berne criterion 3
	Comply with Rome obligations	• All exemptions have to be permissible under the Rome agreement

Table 13: Coding schedule for exemption conditions.

Exemptions for Performer

In addition, some exemptions to Performer rights were separately coded because their nature is significantly different from the exemptions which apply to other types of works. They exist in addition to the standard copyright exemptions. Therefore, when assessing copyright exemptions as applicable to Performers, both sets need to be included. It is clearly noticeable that the additional limitations are designed to facilitate economic exploitation rather than a public good reasoning. In addition, these exemptions tend to be quite absolute in that they contain no further conditions outside of the purpose to determine when they apply.

Additional Performer's Rights Exemptions	**Content**
Remuneration	• The right cannot be exercised if adequate compensation is paid.
Integrity	• The performer has no rights concerning the integrity of the work if the work is a film.
Compulsory consent	• The performer is assumed to have consented to the use and therefore rights to do not apply.
Audio-visual work	• The performer cannot exercise his rights if the work in question is an audio-visual work.
Broadcast performance	• The performer cannot exercise his rights if the performance in question has been broadcast.
Fixation	• Fixation can be made as long as it is for private use.
Employment	• Rights cannot be exercised if the performance was made in the course of employment
Authorized fixation	• An authorized fixation does permit further uses of the this specific fixation

Table 14: Coding schedule for performer exemptions.

Same use as authorized fixation	• Rights cannot be exercised if the use in question is essentially the same as the one for which the original permission was granted
Public performance/ exhibition on spot reference	• Exemption if the work is made available for public performance or on the spot reference
Nature of the institution	• Certain institutions are always permitted to make changes to the material • For example: exclusion of disturbing material by the broadcaster
Reasonable exercise	• The rights can only be exercised to the extent that is reasonable and prevents an unduly impact on the rights holder.

Table 14: Coding schedule for performer exemptions.

Exemptions for Moral Rights

Exemptions for moral rights were also coded separately because their purposes are fundamentally different from those applying to different sets of rights. Again the coding was done according the purpose of the exemption, describing situations where moral rights are limited. The coding included the type of work and which specific moral right is affected by what exemption. The particular conditions did not have to be recorded because the exemptions here are already so narrow that the purpose and conditions are practically identical. It should also be noted that the exemptions tend to be highly country specific and cross-country overlap is very limited in practice.

Exemption to Moral Rights	Content
Advertisement	• Performance made for the purpose of an advertisement
Assertion Requirement	• The moral right can only be exercised if it has been asserted beforehand
Audio-Visual Work	• Moral rights cannot be exercised in relation to an audio-visual work
Collective Management	• The moral right can only be exercised by a collection society; Usually refers to remuneration
Collective work	• The moral rights cannot be exercised if the underlying work is a collective work
Competition Considerations	• Any activity which would have significant implications for competition is not subject to moral rights
Computer Programs	• The moral rights do not apply if the underlying work is a computer program
Conservation Efforts	• Any changes to the work which are the result of conservation efforts are not be subject to moral rights
Contract	• Any action allowed under a contract are not subject to moral rights
Copyright Exemptions	• The moral rights cannot be used to limit uses permitted under the copyright exemptions
Destruction	• Any activity which destroys the work is not subject to moral rights
Disclaimer	• The moral rights cannot be exercised if the adapted work has a disclaimer on it which distances the author from the changed work
Expiration	• Any activity after the moral rights have expired are not subject to moral rights
Get Name Removed	• Exercising the moral right is limited to have author's name removed
Incorporation into Building	• Any activity affecting the work if the work is part of a building are not subject to moral rights
Minimum Time Limit	• The right applies for a minimum term; Relevant if the right usually expires with the owner's death
Monetary Limit	• The exercise of the right is limited in value; especially relevant to the resale right

Table 15: Coding schedule for moral rights exemptions.

Nature of Materials	• Any changes to the work which are the result of the materials used and their specific characteristics are not subject to moral rights
Passing of Time	• Any changes to the work which are created by the passing of time itself cannot be subject to moral rights
Prejudice of Honour	• Any activity has to be at least prejudicial to the honour of the author to fall within the moral right remit
Prejudice Reputation	• Any activity has to be at least prejudicial to the reputation of the author to be subject to moral rights
Public Presentation	• Any changes to the work which are the result of presenting the work to the public are not subject to moral rights
Public Safety/ Judicial Proceedings	• Any activity which is linked to public safety or judicial proceedings is not subject to moral rights
Reasonable Exercise	• The moral right has to be exercised in a reasonable manner
Requires a Declaration of Intent	• Exercising the moral right is only possible after the intent to do so has been declared beforehand
Requires Compensation of Owner	• Exercising the moral right requires the owner of the work to be compensated
Unreasonable Effect on Owner	• Any exercise of the right which would have an unreasonable effect on the owner of the work is not subject to moral rights
Work for Hire	• The moral rights do not apply if the underlying work was created in the course of employment

Table 15: Coding schedule for moral rights exemptions.

4.2.5 The Enforcement

In the fourth part, the centre of attention shifts to the enforcement of copyright. This section outlines the available sanctions as well as the kinds of infringement they are applicable to. Finally, the last part examines the protection of foreigners in comparison to nationals. The key considerations are both the extent of protection and the role of formalities.

Sanctions

The final dimension included was the sanctions which refer to particular remedies available to tackle infringement. The decision was made against coding for the actual stringency of the offense, for example the maximum amount of a fine. The timeframe is so long that the legal systems have changed in how they punish. It would be nearly impossible to compare prison sentences with hard labour (UK, 1911 Copyright Act) to pure fines or modern prison sentences. Similarly, monetary values are difficult to compare over time and across countries. In addition to inflation and varying conversion rates, Germany especially switched its currency several times in the examined period. Finally, a rarely used very punitive sanction may be less relevant in practice in practice than a more lenient but regularly used one. In sum, only the type of sanction is recorded.

The following sanctions were identified in copyright policies across the timeframe examined:

Sanction	Content
Injunction	• Injunction against an individual with the aim to stop the infringing activity
Seizure/ deliver up	• Infringing material can be seized or has to be delivered up to the court/ copyright owner
Profits	• Infringer can be order to pay the profits he made from the infringing activity
Fines	• Payment of a fine by the infringer
Prison	• Prison sentences to be served by the infringer
Duty to Provide Information	• Duty to provide information on the infringing activity, its organization and other infringers • can apply to the infringer and those linked to him
Search Warrants	• Search warrants can be issued with the aim of securing evidence on the infringing activity
Private Searches/ Investigations	• Possibility for private persons to conduct a search or investigation • usually only available in very specific circumstances
Legal Cost	• Requirement to pay for the legal cost of the opponent in addition to one's own
Destruction	• Infringing articles are to be destructed
Lose Copyright Protection	• Lose the benefits which follow from copyright protection • de-validates copyright
Injunction Against the Internet Service Provider (ISP)	• Injunction against the ISP to stop an infringing activity on the Internet • usually entails the removal of infringing material from the ISP's servers or blocking access to a side
Import Restrictions	• Certain copyright protected materials cannot be imported into the jurisdiction in question

Table 16: Coding schedule for enforcement.

Types of Infringement

As for what was punished, copyright right works, neighbouring works and Performer have to be considered separately. For each of these, the distinction between commercial-scale infringement, normal infringement and innocent infringement was added. Furthermore, moral rights were split into moral rights relating to copyright works and Performers. Finally, specific offences such as tempering with the digital rights management[34], knowing of infringement, intended infringement, attaching a false ©-note and the failure to deposit were also included.

For the international level, a distinction was drawn between the optional and the mandatory provision of an offense as well as the aim to facilitate. This departs from the national case studies but helps to distinguish between the enforcement capabilities of international agreements. Separate coding was not used because modern agreements such as TRIPs have stronger enforcement capabilities which mirror the national level. Also, not having these specific provisions makes a statement about its available capabilities on its own. The categories of referral to international mediation and provide technical cooperation were added. Both of them are remedies but also reflect the special nature of international agreements compared to national systems.

4.2.6 Protection of Foreigners

The last area of coding concerned the protection works got whose authors are not nationals of the country in question. The coding contains two distinct aspects. The first one is the scope of protection in relation to national authors as well as the country of origin. These are not necessarily mutually exclusive. The second part is formalities and how extensive these are.

[34] Technology to control copying or copyright information.

Extent of Protection	Content
No Protection	• Foreigners do not benefit from any protection under copyright policy
Limited guaranteed protection	• Every foreign author benefits from some protection • The scope of protection is more narrow than that of national authors
Reciprocity	• The protection available to foreign authors cannot be more extensive than in the country of origin
Most-favoured Nation Clause	• Copyright is subject to the WTO style Most-Favoured Nation clause (most favourable terms for any partner apply to all of them)
National Treatment	• Foreign authors benefit from the same scope of protection as national authors
No Formalities	• There are no additional formalities to be complied with by foreign authors
Some Formalities	• Some formalities apply • Refers exclusively to a requirement to publish in the country of question within a set time
Extensive Formalities	• Foreign authors have to comply with formalities which are potentially more extensive than those national authors have to comply with

Table 17: Coding schedule for the protection of foreigners.

4.2.7 Summary

In summary, the data is drawn from the UK, US, Germany and an aggregated International Level and their respective policies between 1880/ 1890 and 2010. The data is based on statute, case law as well as the interpretation of contemporary sources. The resulting data is binary in that provisions are recorded as present or not present. The investigation only focuses on the core components of protection, namely copyright works, neighbouring works, Performers and moral rights. For each of these, the recorded data centres on what is protection, to what extend in which situation and how is it enforced. For all of these areas, the coding schedule relies on narrow and precise definitions which do not overlap.

4.3 Comments on Coding

This thesis applies uses the coding to general empirical evidence. It is therefore necessary to elaborate on what are considered sources: which sources are relevant and how these are combined. This part will first outline the selection process, highlighting how sources were identified, retrieved and sorted. Afterwards, the focus will move to the. It will describe how three different areas were investigated: legislation, case law and secondary sources. Finally, the third part will clarify how the large amount of information was turned into data.

4.3.1 Selecting the Sources

The selection process was started with general reading on the development of copyright. At this point, the case studies were treated as separate, meaning that the first one was completed before a second one was started. The research went further back than the original timeframe to understand the history of the law in addition to tracing the broad developments. For example, for the UK, it started with the Statute of Anne and early case law. Based on this, a preliminary list of all relevant laws and key court cases was compiled for the timeframe of 1880-2010.

The interest now shifted to 1880. The aim was to establish the starting point for the analysis, namely all the documents which affected the state of the law in 1880. To do this, the list of documents was compared to the laws and court cases named in the historical sections of modern commentaries on copyright law and general histories of the time. This worked well for Germany and the US which had largely consolidated copyright acts in 1880.[35] However, it was very complicated for the UK because its copyright law at this stage was not in one but a whole array of parliamentary acts.[36] Therefore, it was necessary to use additional, UK-specific primary sources to complete the list, especially the *1878 Copyright Commission Report* and *Copinger's Law on Copyright* (1870)(W. Copinger 1870; *Report of the Royal Commission* 1878).

It should be noted that although the data set covers 1880 until today, not all case studies are relevant at all times. In 1880, only the UK, US and Germany actually provided a copyright regime. So only those three provide for continuous data from 1880 until 2010. The International Level is incorporated from 1890 because the Berne Convention was concluded in 1886.

The historical accounts on the evolution of copyright law in the different case studies were then used to build a skeleton outline. It includes which acts were in force when and which court cases are important. In a second step, the timeline was complemented by using contemporary legal textbooks on copyright law[37], amendment histories, legal databases as well as commentaries on specific acts, court cases or other events. The result was a nearly complete picture of which documents needed to be examined to assess the state of the law for the chosen point in time. The result was a list of amendments which had taken place between 1880 and 2010 as well as the complete list of relevant documents for 1880. The next step now was to collect the sources.

[35] These acts were (Germany 1870; US 1870; US 1874; Germany 1876; *Post Office Amendment Act* 1879).
[36] Laws include 1842 Copyright Act; 1852 International Copyright Act and the 1862 Fine Arts Copyright Act. For a complete list, see the attached amendment history.
[37] For example, several editions of Copinger on Copyright Law were used to track down important acts and court cases for the UK as well as the US.

Different strategies were employed to retrieve the sources. For the early stages, most of acts were available in the on-line archive *Primary Sources on Copyright (1450-1900)* (L. Bently et al. 2008). However, for later periods, especially 1900 to roughly 1970, many original acts are not accessible on-line. In these cases, I relied on the collections of libraries in both Britain and Germany, including the British Library and the Deutsche Nationalbibliothek. As with the laws, most of the pre-1900 commentaries were available on-line whereas later ones could only be accessed via library collections. The Internet became important again for modern laws, especially those after 1990. Legal databases such as Westlaw, Westlaw International and HeinOnline proved most valuable for both the retrieval of original acts and to trace the relevant amendments, especially for the US and the UK. As for Germany, the most important resource was the amendment history by Fuchs (T. Fuchs 2008). It provided codified versions of all copyright articles since 1965. In sum, by this point, a list of amendments and the relevant acts and case law had been collected. The next step now was to determine the actual state of the law for each point in time.

4.3.2 State of Law

The state of the substantive law was then determined by reference to the collected acts, court cases and contemporary as well as modern secondary sources. Any additional relevant primary sources identified in this process were also collected and included in the study. In the first step, the laws were retrieved and analysed. If any aspect was unclear, contemporary commentaries on copyright law were used to resolve the issue. The choice was made to only rely on contemporary sources at this stage to limit a modern style bias in the interpretation of the law. Afterwards, modern secondary sources, including histories, articles and commentaries, were consulted for additional information which was not apparent from the laws themselves. For example, commentaries would highlight the most important court cases and how they impacted on the legislation. Similarly, they contain lists of amending laws which can then be traced. Thirdly, the court case references and minor amending laws which had appeared in the commentaries or secondary sources were followed up, assessed if they were relevant to the study of copyright as conducted here and if so, analysed. The notes from the three individual steps were kept separate unless it became clear that a legal provision had been misinterpreted.

The same process was repeated for every decade for each case study examined, except for one minor change. Unless there was a general revision or codification of the law, the notes from the earlier decade were used and only adapted to reflect the amendments. All these changes were done in cursive to make them easily identifiable later on. Therefore, at the end of this note-taking stage, three sets of notes existed: the legislation; relevant case law and the opinions by authors.

For each case study, one or more secondary sources proved especially useful. For the early stages of copyright law, the on-line archive *Primary Sources on Copyright (1450-1900)* (L. Bently et al. 2008) was a valuable starting point because the historical comments written to accompany the acts provided insights into both the context and the meaning of the specific act. However, the quality of these comments was generally lower for the US and even more so for German laws. For the international dimension, I

relied heavily on Ricketson and Ginsberg's *The Berne Convention and beyond,* Goldstein's *International Copyright* and von Lewinski's *International Copyright Law and Policy* (P. Goldstein 2001; S. Ricketson et al. 2006; S. von Lewinski 2008). These provide detailed explanations of the provisions of all relevant international agreements, including their contexts. In addition, for the EU, the core commentary proved to be Walter and von Lewinski's *European Copyright Law* (M. Walter et al. 2010).

The UK's copyright provisions have been very complex from the beginning. This made *Copinger's Law on Copyright* so useful because it has been revised continuously since 1870 (W. Copinger 1870; W. Copinger et al. 1915; J. Skone James 1948; F. Skone James et al. 1958; J. Skone James 1980; J. Skone James 1991; W. Copinger et al. 1998; K. Garnett et al. 2004; K. Garnett et al. 2010). Differences in substantive law were easily identified because the structure stayed largely constant. On the other hand, the copyright provisions and the case law got more complex as time went on in Germany and the US. It is therefore not surprising that most of the key sources here are rather modern. In the case of the US, the most important sources were the annotated versions of the *United States Code*. In addition, the special nature of the fair use-doctrine required heavy reliance on academic articles.[38] For Germany, the copyright commentaries by Nordemann et al as well as the explanations provided by Rehbinder (and their respective revisions) proved to be very useful (H. Hubman et al. 1991; F. Fromm et al. 1998; M. Rehbinder 2001; M. Rehbinder 2002; F. Fromm et al. 2008; M. Rehbinder 2010)**.**

[38] For example: (L. Yankwich 1954; A. Latman 1958; W. Fisher III 1988; J. Hughes 2003; B. Beebe 2008).

4.3.3 Comparable Data

Once all of the information was collected, it could be coded.[39] The aim of the coding was to trace amendments to the state of the law. For every point in time, several different sources were coded for separately. The first round of coding focused on the legislative acts themselves. In a second step then, the information drawn from court trials and secondary sources was added. Discrepancies between the different sets were investigated by referring back to the relevant sources. Most of the issues were resolved this way as the coding concerned mainly general points rather than specific issues of legal debate. Finally, once the whole timeframe had been covered, the data was re-arranged according to work/ exemption type and chronology as the second sorting principle. Any jumps in protection which appeared by putting the actual items together were investigated and if necessary corrected. This way, many transposition issues were successfully identified and resolved.

It needs to be emphasised here that the state of the law was recorded for exactly the same point in time. The state of the law was assessed every 10 years. This also means that some developments appear later than they actually were. For example, the 1911 UK Copyright Act is only going to feature in the analysis from 1920 onwards. To keep the approach consistent, the cut-off date is the 31/12 of the respective year and only sections in effect are included. This is especially important when acts are very close to this date. For example, the CDPA was not fully in force by 31/12/1990.

It should also be noted that changes were only included if they had been stated, either by law or by a court or any other similar way. For example, when the parody exemption was introduced in Germany in 1971 by the Bundesgerichtshof (Disney Parodie 1970), this was not back dated to 1965 when the Act was first introduced. It could be argued that the substantive relevant provision has been the same and therefore the right has existed before even if it was never explicitly pronounced. However, this could potentially mask changing attitudes. The one exemption here is

[39] For the detailed coding schedule, please see section 4.2 The Data Set.

the US provision of fair use. This doctrine is court made and the codification is argued to not have changed its substance. Therefore, the decisions have to be backdated as to what is actually exempt. Following the literature though, the same logic does not apply to weighting of factors and conditions as applied by the courts (L. Yankwich 1954; A. Latman 1958; W. Fisher III 1988; B. Beebe 2008).

In addition, 'repealed' does not always mean fully repealed, especially in older acts. For example, the 1911 UK act is said to have repealed all prior acts, however, it did not. The separate musical copyright enforcement acts remained in force as did sec. 7 and 8 of the 1862 Fine Arts Copyright Act. Similarly, the German Copyright Act of 1901 did not repeal all sections of the previous act: §§ 57-60 remained in force (Germany 1870; Germany 1901). It is important to check the actual amendment schedules for older laws as sometimes, single paragraphs remained in force. This error can also be prevented by referring back to contemporary commentaries.

It should be noted at this point that the international convention are classified according to their full potential. For example, the 1967 Stockholm Act was never ratified, however, the Paris revision 4 years later included substantially the same terms but by then these were acceptable to the developed countries. Therefore, in order to catch the full normative potential of a treaty, its optional provisions are taken at face value.

Coding the International Level

Particular attention needs to be paid to the International Level because it is an aggregate. The international system as it appears in this thesis represents the strongest level of protection that the international system has to offer in terms of copyright and related rights protection. As such, it is the sum of the separate international agreements which exist in the field. This gives rise to an ideal type 'super-agreement' which reflects the level of protection which is possible. It aims to show what a country which is member to all of these agreements has to implement. It therefore provides a comparative yard stick both in terms of additional stringency which a national system shows as well as the consensus at the international level.[40]

The international dimension was aggregated on what protection is available for a type of work at the international level. To do this, for every point in time, the provisions contained in the separate international agreements were compared directly and aggregated. In terms of rights granted, this means that for every work type which is protected at the international level the longest term available and the maximum of economic as well as moral rights was recorded. For example, until 1960 the international protection is solely determined by the protection guaranteed via the Berne Convention. By 1970, the 1961 Rome Convention added the protection of sound recordings and performers and broadcasts to the list of protected works.

In terms of formalities, the aggregation reflects what is necessary to ensure benefits from all included agreements for the specific work type. Therefore, all possibly relevant requirements are included. The 1952 UCC adds the ©-note requirement as a precondition for protection. Although the UCC is generally not as stringent as Berne (P.

[40] It should be noted here that this consensus is somewhat biased by the way a treaty can take effect at the national level because the way a treaty takes effect varies. In some countries, treaties take effect after a ratification or similar legislative action. Treaties are considered self-executing to the extent that they are detailed enough while vague provisions need to be supplemented by national legislation. Most civil law countries as well as the US fall within this category. As for the second group, here treaties only take effect and to the extent that the provisions have been transposed into national laws. The treaties therefore only take effect via the national legislation and not directly. Most common law and Scandinavian countries belong to this group (S. Ricketson 1987: 131- 132) This is important as the effect of negotiating and signing a treaty therefore varies significantly-posing less of a risk of unintended interference with the national system to the second group.

Goldstein 2003: 151- 152), the formality is included here because the membership between the two international agreements is not identical. Therefore to fully benefit from all possible protection, the ©-note is of importance. Because the question of copyright ownership is important for the type of analysis here, the approach followed by the national case studies of coding for the ownership in terms of employer ownership has been followed here too. Therefore, the strongest work for hire doctrine of the agreement in question was included.

In terms of exemptions, the minimum scope was coded-the scope of an exemption which always applies irrespective of what agreement one looks at. Minimum scope of protection in practice is somewhat counter-intuitive though: the more limited the exemption, the stronger is the level of protection granted. Therefore, the works and rights an exemption can affect has to be included. The minimum here means all which can be affected and therefore their maximum number in practice. In terms of conditions, it is also the maximum of conditions as the higher their number, the harder it is to rely on the exemption.

Similarly to the national level, the exemptions tend to be rather complex. As before, equivalent purpose were coded together. This way, the Berne fair use, TRIPs' de minimis and Rome's private use exemption all reflect the same aim: to exempt minor uses without significant commercial importance from copyright regulation. Secondly, international agreements tend to have general clauses along the lines of permitting all usual copyright exemptions as they exist at the national level. This exemption was also aggregated. As for moral rights exemptions, the number is very small which reflects their minor importance at the international level.

In difference to the rights and exemptions, enforcement was coded by decade. The importance was the number of possible enforcement mechanisms at any given point time. The data does allow a more qualitative interpretation outside of the number of enforcement tools though. There is a qualitative shift between the Berne Convention's optional dispute settlement mechanism and the WTO mandatory one. Overall, it should be noted here that the modern state of the art here is essentially

TRIPs as no other agreement contains any additional or stricter provisions.

5. Processing the Data

The previous section has provided a detailed description of the coding schedule and therefore the available data by the end of the coding process. At this stage, it is clear which particular aspects were protected or omitted from the policies at any particular point in time. Nonetheless, this binary data does not lend itself to analysis. Instead, provisions have to be grouped together in such a way as to provide additional information on the policy of a whole. For example, the individual economic rights which are protected need to be considered together. In addition to knowing which particular ones these are, it is necessary to clarify how many of these there are at any given point in time. The nature of these variables are equidistance ordinal-interval variables. Outside of these variables, some information remains binary.

5.1 Counts

The first group of interval variables are those which can be counted. They are calculated by looking at the individual categories of a copyright system and determine how many specific provisions can be recoded under each heading. It is important to emphasise here that their values are directly comparable across case studies because all the data was derived from a set of standardised definitions. The term EW refers to the all economically valuable work types and their collected provisions which are not moral rights. It is therefore the maximum provision if the scope of protection is considered for CR, NR and Performers. For example, let us assume that CR works benefit from three economic rights. Performers have two rights which overlap with the ones from the CR works. However, NR works benefit from two rights which are identical to the CR/ Performer ones but also one more which only applies to them. In this case, the number of economic rights for ER would be four.

The following variables fall within this category:

- Number of Work Types
- Number of Number of Formalities
- Number of EW Economic Rights
- Number of EW Exemptions
- Number of EW Conditions for Exemptions
- Number of EW Exemptions with a Remuneration Condition
- Number of Economic Work Exemptions with a Non-commercial Use Condition
- Number of Economic Work exemptions with a Compensation Condition
- Number of Economic Work Sanctions
- Number of Copyright Works Economic Rights
- Number of Copyright Works Exemptions
- Number of Copyright Works Conditions for Exemptions
- Number of Copyright Works Sanctions
- Number of Moral Rights
- Number of Moral Rights Exemptions
- Number of Moral Rights Sanctions
- Number of Neighbouring Rights Economic Rights
- Number of Neighbouring Rights Exemptions
- Number of Neighbouring Rights Conditions for Exemptions
- Number of Neighbouring Rights Sanctions
- Number of Performer Rights
- Number of Performer Exemptions
- Number of Performer Conditions for Exemptions
- Number of Performer Sanctions
- Number of Sanctions

5.2 Values

In addition to these interval variable whose content can be counted, there are those which represent a value. The term of protection falls within this category. It is clear that the case studies cannot be directly compared because some legislation refer to a number of years from the date of publication while others calculate the end of copyright from the author's death. Therefore, it is necessary to convert these 'life+ x years' terms into a number of years.

This conversion from 'life' to years however is problematic for a number of reasons. Firstly, although equivalences exist for 'life' in the different legislations, they vary across case studies. For example, the following equivalences have been used:

- UK
  - by 1880: life+ 7 years or 42 years from publication
  - from 1990 onwards: life+ 50 years and 50 years from publication
- US:
  - 1980: life+ 50 years or 75 years from publication
  - from 2000: life+ 70 years or 95 years from publication
- Germany:
  - 1880 onwards: life+ 50 years and 50 years from publication until the 1965 Copyright Act
  - after 1965: then it shifts the authorship presumption to other actors rather than provide equivalent term

Therefore, the core question is what timeframe one assumes the author to live after the publication of his work. This will naturally vary greatly between authors and the kind of work in question. As a result, any decision is bound to be arbitrary to some degree. However, as long as the measure is the same for all case studies, the intended effect of comparability is achieved. The choice here is to use the equivalence provided by the UK in 1880 (=35 years).[41] On one hand, it assumes the longest term of all case studies here. Given the overall trend to expanding the term of protection, stringency is

[41] Life+7 years are considered the same as 42 years. Therefore, life is the equivalence of 42 years- 7 years= 35 years.

therefore not artificially reduced. Secondly, this equivalence is from 1880 and therefore the base year approach in stringency.[42]

5.3 Ordinal-Interval Variables

Outside of these countable variables, some of copyright's essential characteristics cannot be counted as such. However, all of them can be understood as gradually increasing whereby the categories designed here are equal distanced ordinal and therefore interval variables. This affects two particular provisions. The first one is the impact of formalities. There are three distinctions here in the law however the boundaries between them are blurry. Formalities can have a constitutive impact. Alternatively, they may affect the enforcement but not the existence of copyright as such. Finally, formalities can have no effect at all. These three categories represent distinct situations.

However, the boundaries between them are blurry and if one considers ranking them, five distinctions can be drawn, independently of the categories above. Formalities can either have no impact at all. These are assigned the score 1. Alternatively, compliance with formalities may not affect the existence of copyright as such but some of them can limit the enforcement. For example, they may prevent infringement actions until compliance has been achieved. The variable score is two in these cases. Thirdly, formalities can always have an enforcement effect (score 3). Fourthly, formalities can always have an enforcement effect. In addition, some of them are constitutive and therefore are required for copyright to exist (score 4). Finally, score 5, represents those situations where formalities are always constitutive and therefore also always affect enforcement. The second interval variable is originality. Determining the level of originality of any copyright policy requires categories which are able to account for degrees of originality. It distinguishes between 'sweat of brow',

[42] For an explanation, see 6.1 Methodology: Laspeyres Index and especially 6.4.1 Normalization and Aggregation.

'judgement' and 'creativity'. [43] However, the boundaries between these terms are fluent. The level of originality is distinguished by five different possible categories. The lowest level of originality is termed 'skill and labour' and refers to the practical absence of an originality requirement (score: 1). The second category is the intermediate step between 'skill/ labour' and 'judgement' as outlined before. It therefore describes a very low but existing level of originality (score: 2). The third category refers to 'judgement' which is (as outlined above) a limited but noticeable originality requirement (score; 3). The fourth group then is the 'creativity-judgement' one. Here the level required is noticeable higher than before and references to individuality are made (score 4). Finally, the firth category is 'creativity' (score: 5).

5.4 Ungrouped data

Not all of the information reflected in the binary data is grouped or can be placed on some kind of ranking. This for example is the case with individual first ownership provisions which can vary from work type to work type. This also applies to the stated justifications stated for legislating or the terminology to describe a particular work. Similarly, the provisions for foreigners cannot be combined without a further frame of references. This ungrouped data remains in its binary form and is not recoded into a variable. Nonetheless, this information is relevant for the analysis.

[43] This distinction is in practice already included in the coding. For a detailed explanation of the terminology, please see Copyright Requirements in 4.22 General Provisions.

5.5 Summary

In conclusion, the binary data derived from coding the policies is now transformed into one of 4 data types. The first one covers those areas where the particular provisions can be counted, for example the number of economic rights. The second group are variables which represent an absolute value. Here this refers to the different terms of protection. The third group then are ordinal-interval variables. Here, the relevant value could not be counted as such but clear distinctions can nonetheless be drawn. Finally, some binary data which remains ungrouped.

Data Type	Variable
Count based interval variable	Number of Work Types
	Number of Number of Formalities
	Number of EW Economic Rights
	Number of EW Exemptions
	Number of Conditions for Exemptions
	Number of EW Exemptions with a Remuneration Condition
	Number of EW Exemptions with a Non-commercial Use Condition
	Number of EW Exemptions with a Compensation Condition
	Number of EW Sanctions
	Number of CR Economic Rights
	Number of CR Exemptions
	Number of CR Conditions for Exemptions
	Number of CR Sanctions
	Number of MORAL RIGHTS
	Number of MORAL RIGHTS Exemptions
	Number of MORAL RIGHTS Sanctions
	Number of NR Economic Rights
	Number of NR Exemptions
	Number of NR Conditions for Exemptions
	Number of NR Sanctions
	Number of Performer Rights
	Number of Performer Exemptions
	Number of Performer Conditions for Exemptions

Table 18: Overview of the individual variables and the related data types.

	Number of Performer Sanctions
	Number of Sanctions
Value based interval variable	Term for CR
	Term for NR
	Term for MORAL RIGHTS
	Term for Performers
5 point interval variable	Impact of Formalities
	Originality
Ungrouped binary data	Act Structure
	Justifications
	Ownership
	Relationship between author and the work
	Transferability of rights
	Limitations on contracts
	Types of Infringement
	Protection of Foreigners

Table 18: Overview of the individual variables and the related data types.

5.6 Illustration Example: Coding the Statute of Anne

5.6.1 Introduction

To illustrate how the coding and recoding into variables works in practice, the Statute of Anne[44] will be used. It is an appropriate illustrating example because it is considered the first modern copyright law. In addition, it is comprehensive enough to cover enough areas to be recognisable as a copyright policy. On the other hand, it is sufficiently narrow in scope to facilitate the illustration process. It should be noted that the Statute of Anne is not divided into sections. However, to structure the discussion the ordering from the coding schedule will be used: from general considerations such as justifications and ownership; to formalities; controlled used; exemptions and finally sanctions. In order to give some idea of location in the act, this section relies on the page numbers from the Copyright Primary Sources' transcript of the Statute (UK 1710).

[44] The UK's Statute of Anne is the first modern copyright law.

5.6.2 Coding the Statute

Reasoning behind the Statute of State

The Statute of Anne starts out with the reasoning of why legislation has been brought in. In the coding schedule, these aims are classified as 'Justifications'.[45] The Statute highlights the detrimental impact of piracy on rights holders. More importantly though, it also explicitly gives emphasis to the incentive justification by referring to the 'encouragement of learned men to compose and write useful books' (p.1). This means that the rationale for protection is to ensure the dissemination of works and not because the author has expended labour when creating it or because his personality is reflected in it. It is therefore 'utilitarianism' rather a natural right- based reasoning. In a similar vein, a significant proportion of the statute focuses on the danger of monopoly pricing and explicitly provides for limits on the cost of books (pp. 3-5). Curtailing the price of books in this sense ensures that their distribution is not impeded by unnecessarily high prices. As a result, protecting the author/ right holder is a means to an end and not an end in itself.

Ownership

The focus now moves on to who benefits from protection. In terms of ownership, the act does not make a reference to the state of law before publication except that the author holds the right. As a result, the coding has to see the author as the presumed owner. It should also be noted though that the act makes no reference to foreigners or the right being granted to authorship as such. Rather, it is the act of publication which brings the act into force (p.1). In the early 18th century, legal acts were not extra- territorial which means that they did not take effect outside of a sovereign state's borders. In this light, it is necessary to assume that only those works which are published in the UK are subject to this Statute and therefore gain copyright

[45] Please see 4.2.2 General provisions.

protection.[46] The right owned by the author is fully transferable to other people. This can be deduced by the act referring consistently to both authors and 'proprietors'. In addition, it contains no limitations on the transferability of rights, for example guaranteed remuneration rights for the author. In terms of the coding, the act therefore has to be coded in the area of contract as 'transferable' and 'fully'.

The Statute provides the rights holder with a limited protection for books. Throughout, the legislation only refers to 'book' when it discusses the focal point of protection. In terms of the coding schedule, this only matches the description of 'literature works', defined in the coding schedule as any expression which takes the shape of a text.

In line with the rationale that copyright is designed to ensure the creation and circulation of works, the Statute of Anne clarifies that copyright is a limited right. An unlimited right would have a restricting effect on the distribution of works due to the monopoly effect this exclusive right can create. In particular, the statute explicitly states that the term of protection is limited to 'no longer' than 14 years from the time of publication (p. 1).[47] However, if the author is still alive after this term, he can get another 14 years (p. 6). The maximum term of protection is therefore 28 years. The limit on the property right is reinforced by a section on monopoly pricing. By limiting how the property can be used, this also clarifies that the right is not perceived as a real property, such as real estate. In summary, the statute provides for a fully transferable right which remains in force for at least 14 years and a maximum of 28 years.

[46] This would normally be backed up by looking at contemporary sources and commentaries.
[47] For literature works published before the 10/4/1710, it is 21 years (p. 1).

Formalities

At this stage, the focus moves to the requirements to gain protection. To identify which formalities exist, the list of possible formalities in the coding schedule needs to be compared to the legislation. For each of them, it also has to be determined what their influence is on the existence and enforcement of copyright in case they are not complied with. Two qualifications are explicitly included in the act. First, all works need to be registered (p. 2). This 'registration' requirement is not constitutive for copyright protection to exist but it is a requirement to enforce it. The act states that the requirement is intended to protect those who could not otherwise have been expected to know that the work was under protection in the first place (p.2). Therefore, the registration is a practical necessity providing all parties with legal certainty about the copyright status of a book, although it does not create the status as such. The second formality is also non-constitutive but has no practical bearing on enforcement either. For all registered works, copies have to be deposited with the Register who then distributes them to the deposit libraries (p. 4). This 'deposit' formality is only enforced with fines and does not lead to a loss of copyright (p.5).

In addition to these explicit formalities, one more is implied by the terminology used in the act. It consistently refers to books and does not protect anything else. This focus on the physical copy therefore implies that a 'tangible medium' is also required. From a 1710 mind-set, it is not possible to have an intangible book. This means in practice that the 'tangible medium' requirement is constitutive and therefore affects the existence of copyright.

In summary, there are three formalities explicitly named or implied in the act which vary in their effect on copyright. Their impact is always coded in its range, including both the minimum and the maximum impact of formalities. For the Statute of Anne, the weakest impact of the formalities is 'no impact' (from the 'deposit' requirement) while the strongest one is 'constitutive' (from the 'tangible medium' formality). In conclusion, the Statute of Anne includes three formalities (tangible

medium, registration and deposit) although the impact varies from none in practice to constitutive for the existence of copyright.

In addition to these administrative formalities, the coding schedule makes clear that the required originality threshold needs to be examined as well. This act does not include any reference to a minimum requirement of originality. As a result, it is considered here to be very low and therefore 'sweat of the brow' because no minimum is defined or indirectly implied.[48]

Controlled Uses: the economic rights

Once a book has met these requirements, a number of rights (controlled uses) are granted. Generally the shape of rights is identified by comparing what is explicitly protected to what kind of behaviour is considering to be infringing. This means in practice that in addition to what is explicitly listed, it is also necessary to look at which kind of behaviour is subject to sanctions. When we look at which rights are stated, the first one is the reproduction right or as the Statute phrases it 'the sole right and liberty of reprinting' (p.1). This refers to making a one to one copy. The act also refers to the 'importation' right because it defines as infringing behaviour '…shall print reprint or import or cause to be printed reprinted or imported any such Book or Books without the consent of the proprietor' (p.1). Therefore, copyright owners can prevent the import of infringing copies, meaning those copies that were made without the consent of the rights holder.

However, in addition to these two clearly stated rights, another one is implied. This refers to the 'distribution' right and therefore the selling of a physical copy of the work. Making a copy as such does not bring economic harm unless the copy is then distributed. This logic is reinforced by the nature of the act as a whole: it is geared towards the commercial exploitation of works. After all, it refers in its justifications to

[48] Normally, secondary sources would be used here to identify the level of originality as determined by the courts.

the impact that piracy has on the livelihoods of the proprietors (p.1). It is therefore only natural that selling the physical copies of the work is part of the problem and the solution. In this spirit, it is clarified later on that infringement includes the selling in addition to publishing a work (p.1). In summary, although the act only explicitly refers to the reproduction right, the infringement side adds the distribution and importation right to the list.

Exemptions

The next area of consideration is possible exemptions. When trying to identify what exemptions apply, it is paramount to refer back to the coding schedule's list of possible exemptions and their conditions in an effort to identify those implied in the text. In practice, this means that both the explicit exemptions and the description of infringing behaviour need to be compared to the coding schedule. Only referring to both areas and the possibilities of what can be exempt will allow for a clear understanding of what a user can or cannot do.

The Statute of Anne is limited in scope and so it is not surprising that it contains few exemptions: two to be exact. The first one is only implied. The infringing behaviour is focused on the commercial importance of works as it refers to 'print reprint or import'… 'sell publish or expose to sell' (p.1). This also means that making a private copy for yourself with no intent of selling it is not included. In terms of the exemption label, the coding schedule refers to this as the 'private use' exemption. As the use has to be non- commercial in order to be considered private use, the exemption condition is (in the terminology used in the coding schedule) 'non-commercial use only'. Furthermore, as has been mentioned before, the Statute of Anne is only concerned with works that have been published. This in turn also means that the exemption also only applies if a work has been published, making this a condition to rely on it (in the coding schedule: 'published').

In addition to this implied exemption, the second one is stated explicitly: there is no import or distribution right for Greek or Latin books (p. 4). A look at the coding schedule reveals that the description which comes closest for this particular case is 'Foreign Language/ Foreign Country' which is defined as works either written in a foreign language or published in a foreign country. In addition to this, the limitation does not apply to all foreign works but only to the Greek or Latin ones. Therefore, the specific language used is important which in terms of exemption conditions translates into the 'nature of the work' condition.[49] In addition, as mentioned before, the Statute of Anne is only concerned with published works. Therefore, the condition that the work has been previously published in order to rely on this exemption also has to be met ('published' in the coding schedule). In summary, there are two exemptions here which include four conditions overall.

Sanctions

Finally, the Statute of Anne contains a range of sanctions as remedies against infringing behaviour. As with the other areas, determining their existence requires both looking at what is explicitly stated but also read between the lines, using the coding schedule as guidance. Here, most of the sanctions are stated. First of all, infringing copies can be seized and then destroyed by the copyright owner (pp. 1-2). In terms of the coding schedule, this falls within the definition of the sanctions 'seizure/ delivery up' and 'destruction'. Furthermore, the act states that infringers need to pay a fine for each infringing page (p.2). In terms of sanctions, this refers to a 'fine'. The same punishment also applies in cases where works are not deposited as the act requires (p.5). In addition to these sanctions, the losing party is liable to pay the 'legal costs', including those of the opposing party (p.3). Finally, one sanction is only implied but essential to the judicial process. In any court case, the judge would ask the defendant to stop the behaviour in question which in turn falls within the 'injunction'

[49] Nature of the work is defined as: 'Exemption only applies if the work matches a certain criteria'.

definition as outlined in the coding schedule.[50] Without this option, infringement would not be legally ordered to stop, leading the process ad absurdum. Overall, this act provides for five possible sanctions to remedy a breach of copyright.

Summary

In conclusion, the following provisions can be drawn from the 1709 Statute of Anne using the coding schedule. First, there is only one work type ('literature work') which benefits from the reproduction, distribution and importation right and these are enforceable for 14 years (28 years if the term is renewed) as long as it is present in a tangible form. To actually enforce the right, the work has to be registered. It also needs to be deposited although there is no practical impact on the copyright if the owner fails to do so. Any infringement can be enforced by seizing the infringing copies, destroying them and finally fines. In addition, the legal costs have to be paid by the losing party. All infringing behaviour will be logically ordered to stop. Infringement however cannot be enforced at all if the work is printed in a foreign country because foreign publications do not benefit from protection. Furthermore, non-commercial infringement is not covered and neither is the distribution or importation of Latin and Greek language works.

[50] Injunctions are defined as 'Injunction against an individual with the aim to stop the infringing activity' in the coding schedule.

5.6.3 Processing the Data

The information drawn from the statute now needs to be recoded into variables. In practice, this was already done in the section above. The discussion was divided by copyright areas, for example it outlined the different rights together and referred to the different exemptions in the same section. This highlights how natural it is to discuss copyright provisions by their broader purpose: it adds clarity. From the summary above, the following variables and values can be determined.

The counted variables represent the number of items in a particular category. For example, the statute only protects one type of work ('literature work') and therefore the count for work types is one. The same technique is applied to determine the values for the economic rights, sanctions, exemptions and exemption conditions. In addition, there is the protection in years which is a numerical value. It is transposed directly ('28 years') for the term of protection variable. The third type of variable is the 5 point scale for the impact of formalities. The statute only affects works in tangible form which means that this requirement is constitutive. The registration requirement on the other hand is only relevant for enforcement while the fines have no impact on how the state of copyright as such. A mixture of enforcement and constitutive formalities scores a 4 on the effect scale.[51] The level of originality is not mentioned and accordingly not required as far as this exercise is concerned. This translates into a score of 1 as only 'skill/ labour' is required.

[51] For further detail, please see section 5.3 Ordinal- Interval Variables.

Category	Number of Provisions
Work Type	1
Economic Rights	3
Term of Protection	14 years
Formalities	3
Impact of Formality	4
Originality	1
Sanctions	4
Exemptions	2
Exemption Conditions	4
Exemptions (Non-commercial)	1

Table 19: Summary of substantive variables for the Statute of Anne (1709).

6. Copyright Stringency

It has already been emphasised that the scope of protection (its stringency) reflects the degree of government intervention. Without the government granting copyright, the user of a work would be free to copy it. The government intervenes to limit this freedom. At this stage now, it is necessary to clarify how the scope copyright can be determined. The Processing the Data was made the available data directly comparable across countries. However, these variables have one major weakness: although they are comparable across case studies, they cannot be easily compared with each other. Stringency is not a one-dimensional concept but instead is determined by a number of variables with varying impact. This implies that their respective impact (more or less stringency) has to be seen in comparison to each other. This is problematic because the different areas have very different data levels and as such it is difficult to determine to what extent stringency has increased overall. The proposed solution here is to use a composite index.

By using the literature on policy evolutions, the scope of protection as understood in law can be made measureable. In policy convergence, the strength of particular provisions is considered under the term stringency. As outlined above, it focuses on the strength of particular legal provisions, understood as the degree of government intervention (K. Holzinger et al. 2005: 776- 777). In essence, it maps how the substantive provisions have evolved over time focusing on how government has acted. As the following section will show, these evolutions are not only traceable but also measurable.

It is common to compare policies over time according to their overall level of stringency. As long as a policy comes in degrees, the evolution in stringency can be at least ranked (K. Holzinger et al. 2005: 777). Copyright policy does meet this requirement of degrees. Landes and Posner have modelled the scope of intellectual property law in an effort to determine the most efficient design. Essentially, they link the variable for the level of protection (z) (understood as an index) to how it

simultaneously affects the price of copies; the number of copies produced by the copyright owners; the number of unauthorised copies; the economic return of creating a work; and the total number of works created. Stricter levels here are linked with more control over the use of the work by the copyright owner (W. Landes et al. 2003). The important conclusion from their work for this thesis is that the scope of protection can be identified and traced over time. It is clear that stricter levels of protection are linked to owner control.

The actual level of stringency is determined by comparing not only the presence of particular instruments but also their precise setting. Landes and Posner do not assign develop a way to assign values to their stringency index variable z (W. Landes et al. 2003). Similarly, the majority of studies referring to RTB or RTT do include some sense of the strength of protection (D. Drezner 2001). Here as well, what makes a law more stringent is intuitively linked to the level of government intervention in a qualitative way. Essentially, less stringency is the outcome in the absence of government action (D. Vogel 1997: 63- 77; D. Murphy 2004). Vogel stresses though that stringency is not the same as effectiveness (D. Vogel 1997: 6-7). Holzinger and Knill applied this to quantitative analysis of policies. They recorded the precise setting of instruments in addition to their presence (K. Holzinger et al. 2008). In sum, in politics is common to perceive stringency as intuitively identifiable. Although it is not always explicitly stated, this means in relation to government intervention.

The setting of particular instruments provides the same information for quantitative studies. For example, work on the convergence of company law uses indices to determine the level of workers and shareholder protection that case studies provide for. Here, proxies reflecting the aspects which in combination show the level of protection offered are used in the analysis. The indices are based on functional theory which identifies the impact of each proxy on the investigated outcome (S. Deakin et al. 2007; J. Armour et al. 2009; M. Siems 2010). As these examples show, components reflecting the same phenomenon can be combined as long as the

theoretical basis is given. The result is a reflection of the scope of protection, here termed stringency. It is the underlying data which determines the accuracy of these claims.

In conclusion, copyright policy shows degrees of protection and the combination and setting of instruments indicates the level of stringency. Both of these characteristics therefore have to be recorded. Therefore, depending on the quality of the underlying data, it will not only be possible to rank stringency but also to measure it.

6.1 Methodology: Laspeyres Index

The aim of the stringency analysis is to trace the evolution of the scope of protection over time. This is achieved here by using a Laspeyres Index. The methodology for constructing this index type has been outlined in Feinstein and Thomas (C. Feinstein et al. 2002: 510- 513). An index is made up of a number of different components. Each of them is expressed relative to a base year and assigned a particular weight. In essence therefore, the formula to arrive at the index value of any particular variable looks like this: $\frac{variable}{base\ year}$ x weight. The weight is to be determined by the researcher and depends on the underlying problem. The individual components are then combined. The overall results show the quantity of what is measured over time whereby all numbers are relative to the base year (C. Feinstein et al. 2002: 510-513).

To apply this methodology to the concept of stringency, it is first necessary to look at copyright protection and how the scope can be represented by variables. The OECD and European Commission have pointed out that the underlying concept has to be defined in detail first. This includes a clear definition of the concept, an outline of the relevant subgroups and an identification of the indicators which can represent the concept (OECD; European Commission 2008: 22-23). In a second step then, the

individual variables have to be transformed into index numbers by expressing them relative to the base year. At this stage, it is also essential to look at each variable and identify how it relates to the scope of protection. The key focus needs to be if it strengthens or weakens protection. Finally, the individual indices have to be combined, following the theory outlined in the first section.

6.2 Stringency as a Laspeyres Index

6.2.1 Defining Stringency as a Concept

The indicator is designed to measure the concept of stringency of copyright law. As established before, the stringency corresponds here with government intervention. The government limits unrestricted copying. Increasing stringency is reflected in the protection the government provides for the copyright owner and/ or author. In turn, falling stringency is reflected in the freedom of the user to exploit a work. It has also already been established in the literature review that copyright policy includes a number of core areas: copyrighted works, neighbouring rights and Performers. In addition, there are some prerequisites which have to be met, for example formalities. Finally, copyright policy also has an enforcement component. On the basis of this understanding of copyright policy, stringency can be divided into six distinct areas (which will be described in detail in 6.2.2 Stringency Areas).

6.2.2 Stringency Areas

The first stringency area is the copyright threshold. Here, the importance is the extent to which work can generally benefit from protection, both in terms of the kind of works which are affected but also the threshold which needs to crossed. Secondly, the scope of economic copyright protection defines the financial return copyright provides to copyright works, neighbouring rights and Performers. These areas are about the actual strength of protection in the sense of the exploitation of a work. The benefits from this kind of protection go to the copyright owner, irrespective if he is also the author. It protects his rights against users and the authors. Those behaviours explicitly permitted under copyright and which therefore ensure the continued access of the user to the work clarify the lines of protection.

Thirdly, the scope of moral rights is also essential. The government here intervenes to protect the author from both the users as well as the owners of the copyright. This kind of protection is in addition and also at the expense of the protection granted under the economic exploitability dimension. Exemptions here indicate how extensive the cost to the copyright owners and users (as opposed to the owner) can be. Finally, the enforcement has to be considered because irrespective of how extensive protection may be, the actual enforcement capabilities are important on their own and have to be seen as an independent area. These six areas in combination provide a picture of stringency in copyright policy which is captured in the value of the index.

6.3 The Variables

The concept of stringency outlined above provides the basis for selecting the variables which best represent the concept. The indicators are selected on the basis of what can be clearly deduced from the policies. They are all outputs and therefore describe the actual characteristics of the policy. The variables used here from the Processing the Data and represent the basic data set. All of them are in interval

variable form. This means that the concept here can be measured rather than only ranked. It is valid to perform mathematical and statistical operations on interval variables which cannot be used for ordinal ones. It needs to be highlighted that the relationship between the particular variable and stringency varies. If they benefit the user, then the level of stringency is falling as they increase in number. However, if they benefit the author instead, then stringency levels are rising.

	specific type of work affected	**Falling Stringency**	**Rising Stringency**
Number of Work Types		decrease	increase
Number of Formalities		increase	decrease
Number of Rights	CR, NR, Moral Rights, Performers	decrease	increase
Term of Protection	CR, NR, Moral Rights, Performers	decrease	increase
Number of Exemptions	CR, NR, Moral Rights, Performers	increase	decrease
Average Number of Conditions attached to an Exemption	CR, NR, Performers	decrease	increase
Term of Protection	CR, NR, Moral Rights, Performers	decrease	increase
(specific) Sanctions	CR, NR, Moral Rights, Performers	decrease	increase
Sanctions		decrease	increase
Impact of Formalities		decrease	increase
Originality		decrease	increase

Table 20: Summary of copyright variables and their relationship to the level of stringency.

In the case of falling stringency levels, the trend is downwards towards less protection. This means that the number of separate work types and rights decrease over time for all groups of works and moral rights. The term of protection will also expected to get shorter. In addition, exemptions will be broadened by increasing their number while reducing the number of conditions attached to them. Another signal for a decrease in stringency is an increase in constitutive formalities and higher originality requirements which have the effect of raising the threshold to gain protection in the first place. It therefore limits the scope of overall protection. This imposes a cost on the potential rights owner in the form of either no protection or higher cost of compliance. In summary, falling stringency is characterised by providing less rights to fewer works with broader exemptions while at the same time raising the threshold for protection as a whole.

Rising stringency is the binary opposite. If the level of stringency increases, the number of works protected and the rights these enjoy will increase over time to cover as many uses as possible-for as long as possible. Moreover, the number of moral rights also increases. At the same time, the exemptions which apply to moral and economic rights decrease as a whole. However, the number of conditions which have to be fulfilled to benefit from an exemption will rise, becoming increasingly onerous and therefore limiting the scope of the exemptions. Furthermore, the threshold to profit from protection will be reduced as formalities lose their constitutive importance or are abolished while the originality level is lowered to ensure that more kinds of works are covered. In essence, rising stringency in copyright policy takes shape as more economic and moral rights for more kinds of works for longer terms while limiting the scope of exemptions.

6.4 The Stringency Index

The previous sections have outlined the structure of the stringency as well as the possible variables. By constructing a composite index, these two distinct considerations can be connected. The following section outlines how the relevant variables are combined to arrive at an overall measure of stringency for each of the six stringency areas. It will first clarify the normalisation process. It then discusses the individual index areas and the relevant variables for each.

6.4.1 Normalization and Aggregation

In a Laspeyres index, the data needs to be normalised according to a reference point (base year). This base year was chosen to be the average of the three national case studies in 1880. Neutrality and comparability are the most desirable characteristics. These can be best fulfilled by relying on an average of all systems in the sample prior to internationalization taking a hold and therefore possibly exert an influence. Therefore, the values present in 1880 for each variable used here in the three national case studies (Germany, US and UK) were averaged. These were then used to normalise the data. In summary, the data has been normalised by using the reference year 1880.

The normalized data has been aggregated following the actual theoretical framework. The core aspect is that some variables show rising stringency while others do not and that these can potentially balance each other. Therefore, variables where rising numbers indicate more stringency are added up. On the other hand, if rises in absolute number actually mean less stringency in policy terms, then the variable is subtracted.

The individual variables are combined with equal weight for each of the sub-areas considered here. The choice was made here to weigh at the sub-level because it is essential that all individual variables carry the same weight within each area rather than overall. These were then only added up and not weighted again as this would

have no systematic impact. In essence, the trend is the same irrespective if the weighting is repeated at overall index level – only the scale would differ. The result is the overall stringency level for a case study compared to the average in 1880.

6.4.2 Summary: The Components of the Stringency Index

In this final section, the stringency areas are discussed in detail. It outlines the particular indicators used and how these affect stringency. It also describes the calculations.

Copyright Threshold

The copyright threshold seeks to measure how extensive copyright protection is as a whole rather than the stringency of the actual provisions. In terms of variables, these centre on those aspects which prevent a work from being protected. Firstly, the required level of originality defines if a work can benefit from copyright. Here, the higher the level of originality, the more limited is protection because less works will fulfil the criterion and therefore be able to benefit from protection. Originality is only relevant to CR works but strongly informs the threshold as a whole-it impacts on the perception of copyright policy. The second variable is the number of work types which are protected. These include for example literature works, musical works or sound recordings. The higher the number works types which are protected, the more stringent is the policy (if the work has the required level of originality).

Finally, the formalities can prevent a type of work which is sufficiently original and is an eligible kind of work from gaining actual protection or can make it lose it. The variables for this are both the number of formalities as well as their effect on securing and enforcing copyright protection. The lower the number of formalities, the more stringent is the copyright policy as a whole because more works will benefit: less effort is involved in securing compliance. Similarly, the less impact non-compliance with

formalities has (indicated by a higher score), the more stringent is the policy. Again it allows more works to benefit from protection automatically.

For the Threshold of Copyright, the work types, originality and the impact of Formalities[52] are all added up. They all indicate rising stringency as the numbers get larger. The number of formalities however is subtracted. Here, higher numbers show less stringency. The result is then divided by the number of variables, here four.

Scope of Protection for Groups of Works

The considerations in this area are relevant for three groups of works: the CR works, the NR works and the Performers. Each of them constitutes a separate component in the overall stringency index. However, they are identical in the types of variables they are based on. Therefore, they can be outlined here together.

In general, the scope of economic rights outlines the protection a copyright owner has over the use of the work. Five variables describe this: the first one is the number of rights whereby each right is essentially a specific kind of use or exploitation of a work. The more rights a copyright owner has, the more he can control the use of the work and therefore the higher the level of stringency. Outside of the rights, the uses which are not protected are also important. Here, the number of exemptions serves as the variable for the protection not granted. Therefore higher numbers of exemptions represent less stringency. The government has not intervened to grant the protection to the rights owner but left the uses explicitly unregulated by copyright policy.

On the other hand, any condition the government imposes on the applicability of exemptions reduces their scope and therefore enhances stringency. As a result, the

[52] It should be noted that the impact of formalities uses the absolute distinctions drawn in chapter 5. However, if formalities have a constitutive effect, they do not have an effect on the level of stringency. Therefore, 0 is assigned if formalities can prevent copyright from taking effect. A value of 1 is relevant when the maximum effect is enforcement limitations. Finally, a 2 is assigned if formalities have no effect.

average number of conditions attached to an exemption is also included in the index. Finally, the actual term of protection is important here. The longer the term of protection, the more stringent is the policy. Finally, the last variable concerns the enforcement of protection specifically, as measured by the number of sanctions that are available to remedy the infringement of protected in works. The enforcement is stronger if there are more sanctions available. Therefore, rising numbers of sanctions means an increase in the level of stringency.

For CR, NR and Performers, the number of rights, the term of protection, the condition average and the number of sanctions are added up. The number of exemptions is subtracted from them because here higher numbers show falling stringency. The result is then divided by five (the number of variables used).

Scope of Protection for Moral Rights

The scope of moral right focuses on the protection given to authors as opposed to both the copyright and users. However, they follow the same logic as the scope of Economic Works.[53] The first variable is therefore the number of moral rights granted. The higher the number of rights protected, the more stringent is the policy because again situations are removed from the freedom of exploitation. However, moral right exemptions are very specific in nature which means that no actual conditions apply to them. As before, exemptions exclude things from protection and therefore the higher their number, the less stringent is the copyright system. In addition to these two variables, the term of the moral rights is also important. As before, the longer the term, the more stringent is the policy. Finally, the number of sanctions available to moral rights is also included. The more there are, the more stringent is the policy because the enforcement capability is stronger.

[53] The term Economic Works is used here as a summary term for copyright works, neighbouring rights and performers.

The four variables are combined by subtracting the exemptions variable from the number of rights, the term of protection and the number of sanctions. The result is then divided by 4.

Enforcement

Enforcement is a vital part of any policy and in terms of copyright reflected in how copyright breaches are handled. This means that the actual sanctions which apply to copyright infringement are the variable here. The higher the number of sanctions available, the more stringent is the policy. It needs to be noted how this area varies from the sanctions considered earlier. This is not the same as the added number of sanctions for the individual types. Instead, this section seeks to capture the comparative importance of sanctions as a component of copyright policy rather than its practical effect. The enforcement concept only has one variable and therefore aggregation is not necessary here.

The following table summarises the structure of the composite index. The first column highlights the sub-index level in question. In the two adjacent columns then, all relevant variables and their relationship with stringency are provided.

Conceptual Area	Variable	Rising Number Means in Terms of Stringency
Threshold of Copyright	Number of Work Types	Increase
	Level of Originality	Increase
	Number of Formalities	Decrease
	Importance of Formalities	Increase
Scope of Protection for CR works	Number of Economic Rights	Increase
	Number of Exemptions	Decrease
	Number of Average Conditions per Exemption	Increase
	Term	Increase
	Number of Sanctions	Increase
Scope of Protection for Moral Rights	Number of Moral Rights	Increase
	Number of Moral Rights Exemptions	Decrease
	Term	Increase
	Number of Sanctions	Increase
Scope of Protection for NR works	Number of Economic Rights	Increase
	Number of Exemptions	Decrease
	Number of Average Conditions per Exemption	Increase
	Term	Increase
	Number of Sanctions	Increase
Scope of Protection for Performers	Number of Economic Rights	Increase
	Number of Exemptions	Decrease
	Number of Average Conditions per Exemption	Increase
	Term	Increase
	Number of Sanctions	Increase
Enforcement	Number of Sanctions	Increase

Table 21: Summary of the components and the weighting of the components in the composite index.

6.5 Illustration Example: Stringency in the Statute of Anne

To illustrate this methodology, it will be applied to the Statute of Anne. The Processing the Data stage has given us the following basic values for the Statute of Anne:

Category	Number of Provisions
Work Type	1
Economic Rights	3
Term of Protection	28 years
Formalities	3
Impact of Formality	4
Originality	1
Sanctions	4
Exemptions	2
Exemption Conditions	4
Protection of Foreigners	1

Table 22: Summary of substantive variables for the Statute of Anne (1709).

Like in the actual thesis, the comparative standard (base year) will be Germany's, the UK's and the US' average provisions in 1880. It should be noted that there neither neighbouring rights nor Performers benefitted from protection in 1880 in any of the case studies. They are also not considered in the Statute of Anne. As a result, they are not included in the discussion here. The following table shows these:

Provision	Germany	US	UK	Average
Work Type	5	5	5	5
Originality	2	5	5	4
Formalities	3	4	3	3.33
Impact of Formalities	3	1	2	2
Economic Rights	5	6	7	6
Exemptions for Economic Rights	9	9	3	7
Average Conditions for Economic Rights Exemptions	2.67	6.33	1.33	3.44
Sanctions for Economic Rights	5	3	5	4.33
Term for Economic Rights	65	42	42	49.67
Moral Rights	2	1	3	2
Exemptions for Moral Rights	0	0	0	0
Term for Moral Rights	65	0	0	21.67
Sanctions for Moral Rights	0	0	0	0
Sanctions	5	4	5	4.67

Table 23: Provisions in 1880 for Germany, the US and the UK as well as their average.

To assess the stringency levels for the Statute of Anne, each variable has to be normalised according to the average from 1880. This means that the each individual provision has to be divided by the related 1880 average provision. The fourth column presents the results.

Provision	Average	Statue of Anne	Statute of Anne: Index Score
Work Type	5	1	0.2
Originality	4	1	0.25
Formalities	3.33	3	0.9
Impact of Formalities	2	4	2
Economic Rights	6	3	0.5
Exemptions for Economic Rights	7	2	0.29
Average Conditions for Economic Rights Exemptions	3.44	2	0.58
Term for Economic Rights	49.67	28	0.56
Sanctions for Economic Rights	4.33	4	0.92
Moral Rights	2	0	0
Exemptions for Moral Rights	0	0	0
Term for Moral Rights	21.67	0	0
Sanctions for Moral Rights	0	0	0
Sanctions	4.67	4	0.86

Table 24: Normalisation of the Statute of Anne's provisions by the base year 1880.

In the final step now, the individual normalised variables have to be combined in such a way as to reflect the overall level of stringency. It was outlined before, that the scope of protection is reflected by six areas although only four of these are relevant in 1880. These are aggregated accordingly:

Conceptual Area	Variable	Statute of Anne: Index Score	Aggregated Index Scores
Threshold of Copyright	Work Types	0.2	0.83
	Originality	0.25	
	Formalities	0.9	
	Impact of Formalities	2	
Scope of Protection for CR works	Economic Rights	0.5	0.45
	Number of Exemptions	0.29	
	Number of Average Conditions per Exemption	0.58	
	Term	0.56	
	Sanctions	0.92	
Scope of Protection for Moral Rights	Moral Rights	0	0
	Moral Rights Exemptions	0	
	Term	0	
	Sanctions	0	
Enforcement	Number of Sanctions	0.86	0.86

Table 25: Summary of the components and the weighting of the components in the composite index.

The final stringency index score for the Statute of Anne is 0.83+0.45+0+0.86 and therefore 2.14.

7. Copyright Culture

The previous part has outlined how the data used for analysis has been assembled and transformed for the stringency index. Here, this original data will provide the basis for analysing copyright policies in terms of their cultural position. It has pointed out that the copyright systems in the Western world fall into one of two distinct groups according to their legal traditions. The first group are those countries which follow the continental or Roman approach to law and have developed what is commonly referred to as the Author's Rights system (AR). On the other hand, countries with a common law tradition have Common Law copyright systems (CL). Each of these is assumed to have certain characteristic features in their epitomized forms.

This chapter will first summarise the general difference between AR and CL copyright systems. It will then provide a detailed discussion of the differences, focusing on 11 distinct areas where the systems are expected to vary. For each of these, relevant variables will be outlined. In the final section then, it will be shown how the variables need to be recoded for this analysis, transforming them into equidistance 5 point interval variables.

7.1 The Characteristics of the AR and CL Copyright Systems

As outlined before, there are two ideal types identified in the literature. They vary on how they approach copyright: the underlying rationale for protection. In CL countries, both the incentive to create and the labour justification play a role. In AR countries however, all protection is based on the author's personality which is reflected in the work. This difference in the rationale affects all other policy components.

Ideal type CL systems aim for the maximum dissemination of works and therefore seek to ensure that the works are economically exploitable. This means that the right is owned not by the employer at the expense of the author and moral rights are absent. Economic rights and exemptions are designed to ensure the dissemination

without hampering the public access more than necessary. In addition, protection is not automatic in that only those of value are protected which necessitates formalities. However, it does allow for a low originality threshold and the inclusion of new works such as sound recordings. Protection is not granted to foreigners, their public value is home-country bound.

AR systems, on the other hand, emphasise the author and his personality. This necessitates a high originality threshold but works against formalities or the inclusion of technical works. Also, protection is automatic because foreigners can meet the originality requirement. Once protection is granted, it is strong with very few and narrow exemptions (with remuneration) and all benefits go to the author. Finally, the author also benefits from strong moral rights and ownership rules tilted in his favour- both of which weaken the position of employers.

7.2 The Ideal Types as Comparative Standards

The previous sections have described how AR and CL systems vary in how they conceptualise copyright protection and therefore approach it. Nonetheless, it is necessary to take a closer look at the differences between the ideal types by splitting the possible variation into measureable distinctions. To get a more accurate picture of the position of a copyright system, the variation between the ideal types is operationalized as 11 specific dimensions on which they are expected to differ. The difference between the ideal CL and the AR types are subdivided into 5 groups which form a spectrum with AR and CL at the opposite far ends. In general, an ideal CL gets classified into group 1. Group 2 includes those systems which have moved away from the ideal CL but still significantly lean towards it. On the other hand, group 3 describes the middle point between the two ideal types and essentially means that the system in question does not tilt towards either. Group 4 includes systems which tilt towards AR but are not actually ideal types. Finally, ideal AR types are located in group 5. Each of these intervals is qual in distance and therefore all variables base don it are always

equidistance interval variables. Following from this, a system which repeatedly scores only 1 point for each dimension examined will be an ideal CL. By the same token, scoring only 5 points for each dimension characterises an ideal AR. However, most case studies will fall somewhere in the middle and their development will become clearer as more dimensions are examined. The following part will outline the 11 distinct dimensions and how they vary by outline the five categories for each of them. In addition, for each part the relevant classified variables are listed and the rationale behind their selection.

7.2.1 Act Structure

The first dimension examined is the structure of the key acts as such. The variable used to assess this part is based on the ungrouped binary data and follows the outline of the dimension at large. On the far end of the spectrum then, if an act falls precisely into the CL prediction, it will be considered group 1. It will start with definitions, followed by a combined section on CR and NR. This will be followed by ownership considerations, the term of protection, economic rights and infringement. Exemptions and moral rights feature at the end of the act. Performers are treated separately (S. von Lewinski 2008: : 41, 54, 62- 63). Group 2 applies if an act follows the general predictions for a CL system. Of key importance here that economic rights precede the moral right provisions (if present), CR and NR are treated on equal ground and the term of protection appears relatively early in the act. An act is classified within the third group if it does not fit either the AR or the CL predictions.

Category 4 applies if an act falls within the general AR scheme. This means that it handles moral rights before economic rights; CR and NR are dealt with separately and the term of protection appears late within the act. It also includes provisions on contracts, collective rights management and enforcement. In terms of the spectrum, an act which falls squarely into the AR predictions is classified as group 5. Here, moral rights will be followed by provisions on the work itself; NR; economic rights;

exemptions and then the duration of protection. The final sections will focus on copyright related contracts, collective management organizations and finally enforcement (S. von Lewinski 2008: : 41, 51, 62-63).

7.2.2 Justifications

The second characteristic is the importance of justifications. In an ideal CL system, the copyright system is founded on utilitarianism in that it is seen as an incentive to create. Copyright here is a tool to achieve the public policy goal of disseminating knowledge and does not have links to natural justice. The prediction holds that moral rights are not protected while the economic rights are defined narrowly to only grant as much incentive as is needed to achieve the public policy goal. By the same token, the exemptions will be broad and not include remuneration for the author. One step further on the spectrum, classified as group 2, are systems which combine the utilitarian nature of copyright with a labour-inspired natural right. This means that although copyright is designed to be a public policy tool, there is a strong dimension seeing copyright as a natural right because of the labour and other resources the copyright owner has spent on the work. In practice, one would expect to see some stronger protection for economic rights but no or very weak moral rights. Exemptions will be strong although a few of them will entail some remuneration for the author.

Separate of this group are those systems where both natural rights theories have equal strength while utilitarianism plays little role. The expenditure of labour is rewarded as much as the personality of the author is protected. The expectation is to see economic rights paired with weak and narrowly defined moral rights. The exemptions will be significant and some of them include remuneration provisions. These cases will be classified as group 3. Systems which mix a personality based natural rights understanding with utilitarian considerations are classified as a 4. Here, the emphasis is on protecting the personality of the author. At the same though, public

policy goals like the dissemination of knowledge have also left a mark. This means that strong economic rights are coupled with weaker but significant moral rights. Exemptions will be narrow but still comparatively broad. Most of them entail a remuneration provision. In an ideal AR system, classified as 5, only the personality of the author is important and all protection is geared towards him. As a result, broad economic and moral rights receive protection. At the same time, exemptions are very limited in scope and always provide for the remuneration of the author.

This dimension is shaped by the public benefit in comparison to the author's benefit. In utilitarianism, only beneficial works should get protection. This is represented by the Number of Formalities and the Impact of Formalities variables. In addition, the extent of economic protection is relevant. This is shown by the number of EW, their maximum term, the exemptions as well as the average number of conditions which apply. Finally, the value of the author needs to be considered. This is operationalized here by the MORAL RIGHTS, their term of protection and exemptions. It also includes exemptions for EW which have a specific remuneration component: the author therefore always benefits, even though the use serves the public benefit. In sum, the Justifications dimension is determined by variables which represent the extent of protection and its link to the public benefit as well as the value of the author.

7.2.3 Originality

The third dimension examined is the originality threshold. This variable is made up of only the originality variable as the distinctions here are identical to the data processing definitions.[54] The utilitarian-focused CL systems (group 1) only require that a work is not copied from another work, called the 'sweat of the brow' doctrine. Here, labour and skill alone justify the copyright and therefore the threshold is practically non-existent. In group 2 are systems which require a bit more than skill and labour by including a rather small amount of judgement/ individuality. The half-way house

[54] It needs to be highlighted here that this ordinal ranking is opposite to the one used in stringency because the reference frame work is different.

(group 3) is the expenditure of judgement, a concept understood to mean that skill and labour alone are not enough but not requiring creativity. It is in a sense more the independent thought in exercising skill and labour which allows a work to qualify for copyright, reflecting a medium originality standard. Similarly, group 4 systems require judgement or individuality as the basis but only a small amount of actual creativity. AR systems (group 5) protect the author's personality and as a result have a very high threshold which requires creativity in the sense that the author's personality has to be reflected in the work.

7.2.4 Focus of Protection

Fourthly, the systems vary on what is the focus of protection. The variable here is derived directly from the binary data and reflects a combination of information as outlined in this section. The qualitative data is combined according to the particular features described below. In a pure CL system (group 1) with its utilitarian inspiration, the protection centres on the physical copy as the exploitable thing. This kind of protection is characterised by an emphasis on the medium itself rather than the work. Also, in terms of terminology, the protection would be granted to a book rather than a literary work.[55] One step across the spectrum, any fixed expression is protected. This differs from the first group in that a fixed expression is more broadly defined. Particularly, a change in medium is covered under infringement. In essence, while the protection is awarded to an abstract form of a work, it has to take a definite shape/ expression in order to cross the protection threshold. The third group here contains systems where any author expression is protected. This means in practice that the work has to be expressed but the originality requirement is higher compared to group 2. At least judgement has to be evident now, sweat of the brow alone is not enough. Group 4 covers works which include at least judgement but the expression is not necessarily fixed. This means, for example, that a speech is protected as such and not

[55] One good example about terminology is the German term for infringement in the early years was 'Nachdruck' which translates to 'reprint' rather than infringement.

only via the (infringing) recording. Finally, in an ideal AR system (group 5), the protection focuses on the authors personality. This raises the originality threshold to creativity and requires no fixation of the work.

7.2.5 Emphasis of Protection

The fifth contrasting feature covers the emphasis on moral or economic rights in relation to each other. A CL system will exclude moral rights and only protect economic rights (group 1). A system which provides for stronger economic than moral rights but has provisions for both will be classified as group 2. The strength of rights is the result of examining the number of rights granted and the number of exemptions. Furthermore, if moral and economic rights are provided for to the same extent, the system is grouped under 3. However, if moral rights outweigh the economic rights but both groups are independently provided for, then group 4 applies. The ideal AR system will focus on moral rights and anything else will be derived from these, usually extensive economic rights (group 5).

The variables used to determine the Emphasis of Protection compare economic exploitability with the author's individual protection. Economic exploitability is shaped by the presence of formalities and the shape of the positive protection granted. Therefore, the number of formalities and their impact are used in addition to the EW, their term, exemptions and average conditions which apply to them. It also includes the number of sanctions which are available for enforcement. The author's individual rights are represented by the moral rights, their term, exemptions and enforcement.

7.2.6 Ownership

The sixth distinguishing characteristic then focuses on the default ownership of a work. The variable used here is based on the qualitative data coded in its binary form. The content follows the description of the section. In an ideal CL system (group 1), the employer or commissioner always gets first ownership since they have borne the investment necessary to create the work. This is in line with the CL focus on utilitarianism and essentially provides who ever ensures a work gets made the adequate return for their investment. Systems in group 2 make the ownership of the work dependent on the type of work. These systems have a strong work for hire doctrine coupled with the default investor/ employer ownership for some works, especially NR. The ownership will belong to the investor if in doubt. One step further along the spectrum, systems in group 3 will make first ownership entirely dependent on the type of work whereby CR ownership goes to the author and NR ownership to the investor. In group 4, first ownership again depends on the nature of the work but is tilted towards the author. For example, a weak work for hire doctrine including provisions to the effect that the copyright is owned by the author unless stated differently in the contract are expected here. Finally, in an ideal AR system (group 5), the author is first owner of the work irrespective if the work was done in the course of employment or similar circumstances.

7.2.7 Scope of Economic rights

The scope of economic rights as such is another, the seventh, relevant difference. In an ideal CL system, group 1, the economic rights will be limited to the extent necessary to provide an adequate incentive for the creation and dissemination of works. Exemptions in turn will be broad and not include any remuneration for the authors.[56] A system which falls into the second category will have broader but still limited economic rights, paired with broad exemptions. However, some of these will entail remuneration provisions. Group 3 includes the systems which have broad economic rights but also broad exemptions of which a significant number have remuneration provisions. Moving across the spectrum towards the AR systems, a system which is covered by the 4th category will have broad economic rights but the exemptions are relatively narrow. In addition, a significant number of these will be subject to mandatory remuneration. On the far end of the spectrum, a system reflecting the ideal AR (group 5), will have extensive economic rights, very narrow limitations and all of these will be subject to remuneration provisions.

The variables used here cover two areas: the actual exploitability of works and the guaranteed economic benefit of the author. In terms of what can gain protection in the first place, the number of work types, formalities and their impact need to be considered. The level of originality is not relevant here because it only applies to CR works and not NR or Performers while all of these are relevant for this particular dimension. As far as EW protection is concerned, the focus is on the number of EW, their term of protection and the shape of exemptions (both their number and the average conditions which apply to them). In addition, the strength of the enforcement is included via the number of EW sanctions. The compensation of the author is reflected in the variable EW Exemptions with a Remuneration Condition.

[56] An economic right is considered broad if it provides many separate rights which affect a large number of work types. Similarly, an exemption is broad is it applies to a large number of work types with no or a limited number of conditions.

7.2.8 Protection of NR

The scope of rights is relevant to another predicted difference, the 8th, as well: the protection of NR. In an ideal CL system (group 1), NR get the same protection as CR-they are fully assimilated. The first ownership is granted to the investor. The second group also provides strong protection for NR although has either a shorter term or the provided rights are weaker. Again the ownership rules favour the investor. Group 3 systems provide significant although less protection in terms of duration and the rights granted. In addition, first ownership is not automatically granted to the investor any more. On the AR side, neighbouring rights only receive limited protection with a narrow scope of rights and significantly shorter terms compared to CR. The first ownership rules are tilted to benefit the author rather than the investor. (group 4) Finally, an ideal AR system (group 5) provides no NR protection because there is no author personality present to protect in the work.

The Protection of NR is determined by variables showing how NR are protected and who benefits from the protection. NR protection here is relevant in comparison to CR works rather than the substantive protection granted on its own. This variable is based on the qualitative, binary data and based classified using the features outlined above. In addition, the enforcement is important and therefore the NR sanctions are also included. Finally, it is important to consider who actually benefits from the protection, in the form of the assumed first ownership. This variable is the same as for dimension 6 (Ownership).

7.2.9 Formalities

Formalities are the 9th key dividing feature between CL and AR systems. An ideal CL system will seek to limit protection to those works most worthy of protection. As a result, these systems have extensive formalities and these are constitutive for copyright to exist. Further down the spectrum, group 2 systems have some formalities and these will also be preconditions for copyright to exist. In group 3, systems have some formalities which are a precondition to enforcing the copyright. However, copyright exists even if formalities are not complied with. One step down the spectrum towards AR systems, formalities exist but they have no practical effect. Compliance with them is symbolic in terms of copyright although sometimes they are still mandatory for other reasons (group 4). In an AR system (group 5), no formalities are required. This is in line with authorship being the constituting element for protection. This dimension is represented by only two variables: the number of formalities and their impact.

7.2.10 Protection of Foreigners

Another aspect of the difference between the ideal systems, the 10th one examined here, is their approach to the protection of foreigners. Utilitarianism argues that the public benefits from the access to works. However, copyright incentives come at a price which the public has to pay. There is no need to protect a foreign author considering that his incentives are not determined by a foreign country's payment for his works. As a result, ideal CL type systems (group 1) will grant no protection to foreign works and opt for the free-riding instead which benefits their public access goal without having to pay the cost. One step further towards the AR systems though, a country will provide some limited protection to foreign works but paired with extensive formalities (group 2). This way, protection will be in effect limited to a few works as compliance with these formalities requires a conscious, usually expensive or onerous effort. Therefore, the access remains high while the cost is comparatively low.

The next group of systems provides for reciprocity in protection, coupled with some formalities (group 3). Here the protection an author receives depends on the protection foreign authors receive in his own country. In addition, the formalities again limit the actual scope of works affected by the copyright restrictions in practice. Systems classed as group 4 will follow the same reciprocity approach but not require compliance with formalities. The scope of works benefiting from copyright protection does therefore increase. Foreign works get full national treatment in ideal AR systems (group 5) without having to meet any formalities because as protection is based on authorship as such: all authors need to be treated the same. The Protection of Foreigners is operationalized by only three variables. The first one is a qualitative data based on which represents the scope of substantive available protection as outlined above. The other two indicate the strength of formalities: their number and their impact.

7.2.11 Contractual Freedom

Finally, as differentiating characteristic 11, the systems vary on their understanding of how transferable the rights granted are. CL provides for full contractual freedom in line with the assumption that the exploitability of a work is the most important aspect of copyright. This means in practice that if rights can be freely assigned, the work will be exploited to its full potential and therefore the maximum benefit for the public. Many rights are automatically owned by the employer, all rights are assignable or can be waived. Systems in group 2 also provide for full contractual freedom although some rights can only be assigned in return for a guaranteed remuneration which cannot be waived. A more limited contractual freedom can be found in systems belonging to group 3 where not only certain remuneration rights are guaranteed but also some rights as such. The freedom is even more limited in systems where some rights are guaranteed, coupled with extensive remuneration rights. (group 4) Finally, in an ideal AR system, the author is protected most extensively. The fear is that an author or performer is in a significantly weaker position during negotiations

and could therefore lose out from the benefits he deserves. As a result, extensive rights are guaranteed and full remuneration rights exist.

The area of contractual freedom is shaped by contract and ownership provisions in combination with those aspects weakening the rights of the copyright owner. On one hand, contractual aspects are influenced by the ownership rules. Here, the variable is the same as in dimension 6 ('ownership'). In addition, a qualitative data based variable is designed here which provides the necessary information on the assignability of rights as described above. The second area of concern here are those aspects which weaken the copyright owner both vis-à-vis the users and authors. In respect to the user, contracts are affected by those exemptions which require non-commercial use. It implies that commercial uses are still commercially valuable and therefore will be assigned. The same logic applies to exemptions with a remuneration condition. Considering the authors, the moral rights, their term and the exemptions which apply are also relevant.

	1 (CL)	2	3 (middle)	4	5 (AR)	Data Points
1) Structure of the Act	Follow structure completely	Rough outline followed	Structure is a mix	Rough outline AR	Follow structure completely	- Act Structure
2) Justification	Utilitarianisms (incentive for creation)	Utilitarianism natural right (labour)	Both [same strength Incentive natural right (labour and personality)]	Natural right-personality utilitarianism	Natural right-author personality	- Formalities - Impact of Formalities - EW: Economic Rights - EW: Term - EW: Exemptions - EW: Average Conditions - EW: Exemptions with Remuneration - Moral rights - Moral rights: Term - Moral rights: Exemptions

Table 26: Spectrum outline for the classification for ideal types.

3) Originality	None sweat of the brow (skill and labour)	Low (skill, labour, tilting towards judgement)	Some indiv (judgement)	Reflect some author personality (judgement+ tilting towards creativity)	Reflect author personality (creativity)	- Originality
4) Focus of Protection	Tangible copy	Fixed expression	Any author expression	Unfixed author personality	Author personality	- Focus of Protection
5) Emphasis of Protection	Economic rights no moral rights	Stronger econ than moral rights	Same strength moral rights and econ rights	Stronger moral rights than econ rights	moral rights only	- Formalities - Impact of Formalities - EW: Economic Rights - EW: Term - EW: Exemptions - EW: Average Conditions - EW : Sanctions - Moral rights - Moral rights: Term - Moral rights: Exemptions - Moral rights: Sanctions

Table 26: Spectrum outline for the classification for ideal types.

6) Ownership	Employer/commissioner (based on investment)	Depends on nature of the work (tilt towards employer)	Depends entirely on nature of the work	Depend son nature of work (tilt towards author)	Author based on his personality	- Ownership
7) Scope of Economic Rights	Limited scope combined with broad exemptions and no compensation	Limited rights; broad exemptions; some remuneration	Extensive rights and extensive exemptions with some remuneration	Extensive rights; limited exemptions and some author compensation	Extensive rights with very limited exemptions and full author compensation	- Work Type - Formalities - Impact of Formalities - EW: Economic Rights - EW: Term - EW: Exemptions - EW: Average Conditions - EW: Exemptions with Remuneration - EW: Sanctions
8) Protection of NR	Full assimilation to CR with ownership at investor	Strong protection with investment tilt	Some protection mixed rights ownership	Very limited protection ownership tilted to author	No protection	- Ownership - Scope NR - NR: Sanctions

Table 26: Spectrum outline for the classification for ideal types.

9) Role and Shape of Formalities	Extensive formalities as precondition for CR existence	some formalities as precondition for CR	Some formalities as CR enforcement condition	Some formalities but no practical effect	No formalities	- Formalities - Impact of formalities
10) Protection of Foreign Works	No protection	Some protection extensive formalities	Reciprocity with formalities	Reciprocity no formalities	National treatment no formalities	- Protection of Foreign Works - Formalities - Impact of Formalities
11) Contractual Freedom	Full contractual freedom	Full contractual freedom; limited remuneration guarantees; many rights automatically go to investor	Some contractual freedom; some rights guarantees; some remuneration guarantees	Limited contractual freedom as some right are guaranteed and extensive enumeration rights	Very limited contractual freedom as rights are extensively guaranteed + full enumeration rights	- Contract - Ownership - EW: Exemptions with Remuneration - EW: Exemptions with Non-commercial - Moral rights - Moral rights: Term - Moral rights: Exemptions

Table 26: Spectrum outline for the classification for ideal types.

7.3 The Classification of Variables

In the previous part, the general differences between AR and CL systems have been outlined. Based on this general outline, this section will develop a spectrum to allow for any copyright system to be located in relation to the ideal types. The first part will clarify the idea of the spectrum in general. The latter one will then introduce the specific dimensions and their content. Table 1 provides the overview of the discussed features and will be used as a guide with the discussion highlighting key differences between the groups.

The variables from the second stage by themselves are not linked to the ideal types. To operationalize the 5 point spectrum outlined above, every individual variable also has to be transposed onto this scale: the strength of a particular provision has to be linked to its relative position in terms of the predictions made by the ideal types. This is done by giving substance to such terms as 'weak', strong and 'average'. To do this, the first step was to select the maximum value in the sample. This way, rising stringency is controlled for in this analysis. On the basis of this maximum value then, the average provision was calculated by taking the mean.[57] This value represents the neutral state-defined as leaning neither towards CL nor towards AR.

At this stage now, the individual values were calculated for each indicator based on the minimum and maximum brackets. In summary, the terms, 'very strong', 'strong', 'average', 'weak' and 'limited' are giving specific numeral meaning based on the maximum value in the sample. The following table summarized this:

Percentage	**Term**
81%-100%	very strong
61%-80%	strong
41%-60%	average
21%-40%	weak
0%-20%	limited

Table 27: The link between maximum provisions and the relative terms used to describe copyright provisions.

All of the general variables have been reclassified in the light of the CL-AR dichotomy. They are therefore placed on the five point spectrum where 1 indicates CL

[57] All other categories here represent ranges. As a result, the average score was also considered as a range in order to not unduly bias against it. This means the average was broadened from 41% to 60%.

and 5 is representative of AR. Their exact location is determined in relation to the maximum value in the sample. The six general differences between AR and CL systems are broken down and the relevant variables which can be used to measure these differences in practice are selected. The following discussion will outline the ideal types as analytical standards for comparison and how these are operationalized. It should be noted that the cultural classifications are now independent of the actual level of protection.

In addition, there is a second type of classified variables. These are derived directly form the binary data and reflect the presence of particular combination of provisions at a given point in time. In case a dimension is only described by one of these variables, their content is identical to the dimension scale at large. Therefore, what is described as a score of 1 in an area will in turn also be a 1 for this variable. The content of these variables is outlined in the Calculation section to avoid repetition.

7.4 Calculation

The previous section has illustrated how the values for the particular dimensions on which AR and CL systems systematically differ are determined. The final value for the cultural score is calculated by drawing on these values. All 11 individual scores are combined and then averaged. This final mean indicates any copyright's overall position in relation to the ideal AR and CL type as the external measuring bar. Therefore, the respective values for the Act Structure, Justifications, Originality, Focus of Protection, Emphasis of Protection, Ownership, Scope of Protection, Protection of NR, Formalities, Protection of Foreigners and Contractual-ability are all added up. They are then divided by 11 which provides the final score.

7.5 Summary

In summary, the six key differences identified have been subdivided into 11 dimensions: Act Structure (of a statute), Justifications, Originality, Focus of Protection, Emphasis of Protection, Ownership, Protection of NR, Formalities, Protection of Foreigners, Contract-ability. For each of these, a spectrum, divided into 5 groups, was developed by outlining key differences in identifiable features. These provide the framework to assess a copyright system's characteristics in comparison to the ideal types. This framework now needs to be enhanced with specific criteria for classification.

The variation between them in turn can be broken down into five separate distinguishable positions. The variation is operationalized using a number of variables, each of which by itself is already linked to the assumption of AR and CL systems (classification process). The score for each dimension is the mean of the constituent values.

	Act Structure	Justification	Originality	Focus of Protection	Emphasis of Protection	Ownership	Scope of Protection	Protection of NR	Formalities	Protection of Foreigners	Contract-ability
Work Type							X				
Formalities		X			X		X		X	X	
Impact of Formalities		X			X		X		X	X	
EW: Economic Rights		X			X		X				
EW: Term		X			X		X				
CR: Rights					X						
Moral Rights		X			X						X
MORAL RIGHTS: Term		X			X						X
EW: Exemptions		X			X		X				
EW: Exemption Average Conditions		X			X		X				
EW: Exemptions with Remuneration		X					X				X
EW: Exemptions with Non-Commercial											X
EW: Exemptions with Compensation											
MORAL RIGHTS: Exemptions		X			X						X
EW: Sanctions					X		X				
NR: Sanctions					X		X	X			
MORAL RIGHTS: Sanctions					X						
Act Structure	X										
Focus of Protection				X							
Originality			X								
Ownership						X		X			X
Scope of NR								X			
Protection of Foreign Works										X	
Contract (law)											X

Table 28: Calculation table for cultural scores, showing which variables are combined for the particular 11 AR-CL dimensions.

7.6 Illustration Example: Copyright Culture in the Statute of Anne

To illustrate how the culture methodology works in practice, the Statute of Anne's position will be assessed. Like with stringency, culture cannot be assessed independently. The earliest complete set of data available to the author is 1880 and therefore, these will be used.

7.6.1 Classification

In general, the make up of the eleven dimensions which distinguishes AR and from CL systems has been outlined in Table 28.

As a result, each of these first has to be made available in the necessary 5 point spectrum format. For those variables which are either counted or represent a value, this means classifying the values. The link between the value and the spectrum position is determined by the nature of the variable. For example, strong moral rights indicate AR systems and therefore the maximum value would be 5. On the other hand, a large number of exemptions would score a 1 because the variable points to CL systems. The classification of terms follows the scheme of Table 27.

For each variable, the classification schemes have be completed. Therefore, the percentage-boundaries outlined in Table 27 are applied to the respective maximum values for each variable. Once this has been, it is now possible to apply them to the Statute of Anne values. For example, the Statute of Anne provides protection for one type of work. Overall, the maximum provision in the sample is five work types. This means that the provision of the Statute of Anne need to be classified as a category 1 because 1 work type is within the 0% -20% range of the maximum value. Table 29 shows the areas where strong provisions are reflective of AR:

year	Work Type	EW: Economic Rights	EW: term	Moral Rights	Moral Rights: term	Exemptions: EW (Condition Average)	Exemptions: EW (Remuneration)	Exemptions: EW (Compensation)	Sanctions	Sanctions: EW	Sanctions: Moral Rights:
maximum value in the sample	*5*	*7*	*65*	*3*	*65*	*4.9*	*0*	*9*	*6*	*5*	*6*
5 (max)	5	7	65	3	65	4.9	0	9	6	5	6
5 (min)	5	6	53	3	53	3.92	0	8	5	5	5
4 (max)	4	5	52		52	3.91	0	7	4	4	4
4 (min)	4	5	40		40	2.94	0	6	4	4	4
3 (max)	3	4	39	2	39	2.93	0	5	3	3	3
3 (min)	3	3	27	2	27	1.96	0	4	3	3	3
2 (max)	2	2	26	1	26	1.95	0	3	2	2	2
2(min)	2	2	14	1	14	0.98	0	2	2	2	2
1 (max)	1	1	14	0	14	0.97	0	1	1	1	1
1 (min)	0	0	0	0	0	0	0	0	0	0	0
Statute of Anne	1	3	28	0	0	2	0	0	4	4	0
Statute of Anne (classified)	2	3	3	1	1	3	0[58]	1	4	4	1

Table 29: Complete classification scheme for the individual measurable variables which indicate AR.

On the other hand, the CL ones are:

[58] This will be omitted because provisions did not exist in any case study.

	Formality	Exemptions: EW	Exemptions: EW (Non-Commercial)	Exemptions: Moral Rights:
maximum value in the sample	*4*	*10*	*8*	*0*
1 (max)	4	10	8	0
1 (min)	4	9	7	0
2 (max)	3	8	6	0
2 (min)	3	7	5	0
3 (max)	2	6	4	0
3 (min)	2	5	4	0
4(max)	1	4	3	0
4 (min)	1	3	2	0
5 (max)	0	2	1	0
5 (min)	0	0	0	0
Stature of Anne	3	2	1	0
Statute of Anne (classified)	2	5	5	0[59]

Table 30: Complete classification scheme for the individual measurable variables which indicate CL.

[59] Will be omitted from the calculations because there is no maximum provision and therefore a classification is impossible.

7.6.2 Classification from Binary Data

In addition to these, it is necessary to determine the scores for those indicators which are based on the ungrouped binary data. The first one here is the act structure. The Statute of Anne does not contain definitions, NR or moral rights. Nonetheless, ownership rules are defined in second position as the act consistently refers to proprietors and authors although it does not explicitly explain them. The basic term of protection is mentioned early on (14 years). Economic rights are the next section, followed by infringement and then closing on exemptions. All of this justifies the Act Structure as a 1 and therefore ideal CL type.

The second variable is the Focus of Protection. The score is a 1 here as well because the protection focuses only on the tangible medium: the terminology refers to a book and there is no adaptation right or originality requirement apply. Thirdly, the Emphasis of Protection also scores 1 as no MORAL RIGHTS are available in this act. As for the ownership, there are no explicit provisions here. However, the act consistently refers to authors and proprietors which implies a strong work for hire doctrine. In addition, only books are protected and therefore the extent of protection cannot vary according to work type. As a result, it needs to be classified as a 1.

The Statute of Anne does not include foreign authors in the protection. Not only does it not mention anything in this respect in terms of positive protection, it explicitly excludes foreign language works published outside of the UK from protection. They cannot only be imported, but also reprinted and distributed.[60] In the absence of NR protection, the variable cannot be assessed and is therefore omitted. Finally, for contractual freedom, the act does not provide for any limits on the assignability. Although the second set of 14 years is automatically owned by the authors, it is optional anyway since it is only available if the author is still alive. This means that it is not an assignability limitation as such. In sum, the score here is also 1.

[60] The usual process would be to check at this stage for court cases on this topic.

7.6.3 Calculation

	Act Structure	Justification	Originality	Focus of Protection	Emphasis of Protection	Ownership	Scope of Protection	Protection of NR[61]	Formalities	Protection of Foreigners	Contract-ability
Work Type							1				
Formalities		2			2		2		2	2	
Impact of Formalities		3			3		3		3	3	
EW: Economic Rights		3			3		3				
EW: Term		3			3		3				
Moral Rights		1			1						1
Moral Rights: Term		1			1						1
EW: Exemptions		5			5		5				
EW: Exemption Average Conditions		3			3		3				
EW: Exemptions with Remuneration		-					-				-
EW: Exemptions with Non-Commercial											5
Moral Rights: Exemptions		-			-						-
EW: Sanctions					4		4				
NR: Sanctions					-		-				
Moral Rights: Sanctions					1						
Act Structure	1										
Focus of Protection				1							
Originality			1								
Ownership						1					1
Scope of NR								-			
Protection of Foreign Works										1	
Contract (law)											1
Statute of Anne	1	2.6	1	1	2.6	1	3		2.5	2	1.8

Table 31: Calculation table for cultural scores, showing which variables are combined for the particular 11 AR-CL dimensions.

[61] The protection of neighbouring rights was not feasible until 1920. Including it would only cause Ownership on its own to be included twice and therefore bias the result. Therefore, it is omitted.

In summary, the culture score table for the Statute looks like this:

In conclusion, the overall cultural score for the Statute of Anne is the mean of 1+ 2.6+ 1+ 1+ 2.6+ 1+ 3+ 2.5+ 2+ 1.8 and therefore 1.8. The score indicates that the approach to copyright policy in the Statute of Anne is strongly CL in nature. In addition, three of the 10 relevant dimensions show ideal type scores (1). The UK is common law country and therefore a score comparatively close to CL is what was to be expected.

Part 3: Empirical Evidence

The first part of this thesis has outlined those copyright debates and underlying assumptions which this thesis seeks to answer. These were:

	Proposition	Explanation
1	Stringency levels have increased over time.	The level of overall stringency has risen between 1880 and 2010.
2	Technological innovation has caused the rising levels of stringency.	The rise in stringency levels has been a response to the development of new technologies and how these were incorporated into copyright policies.
3	The effect of stringency on the individual has been particular pronounced in the digital age.	The digital age has had a particular effect on stringency, accelerating the trend of rising levels of protection.
4	Corporations have over-proportionally benefited from rising stringency levels in comparison to users.	Corporations and not users have benefitted from copyright reforms.
5	Corporations have over-proportionally benefited from rising stringency levels in comparison to authors.	Corporations and not authors have benefited from copyright reforms.
6	Copyright systems have converged over time.	Copyright systems have become more similar over time.
7	Older copyright policies will show the strongest link to the traditional cultural approach.	Legal traditions and therefore the closeness between a policy and the respective traditional approach are most pronounced in earlier stages of the policy.
8	Copyright policies have moved way from their respective ideal types over time.	Copyright policies have become hybrids over time, moving away from their traditional approaches to copyright.
9	Copyright policies have become increasingly settled over time in how they perceive the purpose of copyright time.	Copyright policies have become more coherent over time and therefore across the different policy areas.
10	The cultural convergence of copyright has been caused by technological innovation.	The convergence of copyright policies on a similar approach has been in response to technological challenges.
11	The cultural convergence of copyright has been caused by individual actors.	The convergence of copyright policies on a similar approach has been in response to the influence of a particular actor on another one.

Table 32: Reminder of Table 1: List of propositions that have been made in the literature.

In the second part, a methodology was developed to provide the empirical evidence to investigate these questions. This part now will use the empirical evidence to re-examine the basic assumptions and arguments relating to the evolution of copyright policy.

Chapter eight will focus on the evolution in terms of stringency. It examines in detail how the stringency levels have shifted over time and the extent to which technology, the main driving force identified in the existing literature, explains this. Chapter nine then moves to the relative balance of benefits between copyright owners, authors and users. The main emphasis is if the relative benefits provided to the different groups have changed over time and if so, which one has benefitted the most.

The focus then moves away from stringency towards culture. In chapter 10, the focus is on the importance of culture to copyright policies is investigated. It examines the link between case studies and their respective ideal types in 1880; the evolution in relation to them over time and if the systems have settled in their understanding of copyright. Finally, chapter 11 examines the case studies in relation to each other, especially if and the degree of cultural convergence between them. In addition, it also clarifies to what extent the causal forces commonly identified in this respect explain the evolutionary pattern.

8. Stringency Evolution

This chapter focuses on the overall evolution of copyright policy in terms of their stringency. This relates mainly to questions one and two from Table 32. It seeks to answer a series of questions drawn from the existing literature on copyright. First, is the agreement on rising stringency levels justified and have these increases been caused by new technology?

Examining the stringency pattern as a whole and the contributory forces is important because it forms the basic assumption when copyright evolution and reform is discussed. On one hand, much of the current political debate is based on rising stringency levels in the past. Copyright owners argue that they have right to further protection because unauthorised uses are piracy and harming their incentive to create. They more or less explicitly refer to past amendments providing for new uses and rights. For example, the recording industry started out as a pirate itself but is now one of the most vocal copyright advocates calling for stronger protection (L. Lessig 2004: 56; B. Kernfeld 2011). On the other side of the spectrum, copyright users argue that stringency levels have risen too much, making copyright a threat to innovation and an intrusive force in private lives (J. Gantz et al. 2005; Institute of Public Policy Research 2006; L. Bently et al. 2009: 35; M. Svensson et al. 2012: 3). In this sense, much of the opposition to and support for expanding the scope of protection is inspired by the perception of strong increases in the past. Given that these forces shape political debates and therefore the future path of reform, examining this basic tenant of their arguments is essential.

In addition to the importance of copyright as an issue, the question of rising stringency levels is also a crucial test for the methodology used here. There is practical unanimity of the long-term increases in stringency. As such, it presents a very strong, most-likely case to find a certain result. If the empirical evidence generated by the stringency index does not replicate these findings, the operationalization of the concept as such is cast into doubt. The index is designed to reflect an existing concept, operationalize rather than redefine it. Therefore, its findings should overlap with the existing literature, given that it is for all intents and purposes in agreement on this issue.

8.1 Evolution

The first question to be examined is how the stringency levels have developed over time. The focus is the overall direction of change. There is agreement in the literature on copyright that the scope of protection, the stringency of the policy, has increased over time. Rising stringency levels are the result of a number of different forces which have been presented in detail in

2.4.2 The Evolution of Copyright Stringency in the Literature. At this stage, it is beneficial though to summarise them again. Calls for stronger protection are justified by the lack of efficient enforcement of existing protection (P. Yu 2009); technological innovation (B. Kernfeld 2011: 218); the economic damage created by international piracy (J. Braithwaite et al. 2000; P. Yu 2009) and the detrimental effect this has on authors (S. Sterk 1996: 1199); the choice of morally charged language (S. Ricketson et al. 2006: 21) and finally the weakness of consumer groups late (J. Braithwaite et al. 2000: 72).

However, although the literature refers to forces which increase protection, it also notes that the same factors can hinder rising stringency levels. Essentially, if the push for more protection becomes too strong, it creates a backlash which in turn negatively affects the legitimacy of copyright.[62] Over time, resistance to expansions in the scope of protection has developed (K. Bowrey 1996: 327), inspired by a number of contributing forces. These are the intrusive impact copyright has developed on individuals and their lifestyle (K. Bowrey 1996: 327; J. Gantz et al. 2005; B. Kernfeld 2011);[63] 7he exaggeration of piracy (J. Barnes 1974: 96- 97; S. Ricketson et al. 2006: 21; B. Kernfeld 2011: 193); the unclear benefit of copyright policy as an incentive to create and disseminate works (J. Campbell 2006: 8-9; E. Höffner 2010: 385) and the strong role played by corporations (J. Ginsburg 2001: 1646; L. Lessig 2004: 233).

The methodology can contribute to this question because it traces the stringency levels over time. It is therefore able to identify periods of rising and falling stringency levels. Given that the consensus is clearly on levels of rising stringency, it

[62] For a detailed explanation, please see Tilting Balance in 2.4 Stringency: The Scope of Protection.
[63] This has been well documented in relation to music piracy by Kernfeld (B. Kernfeld 2011).

would be undermined by instances when it has fallen.[64] In addition to the general pattern of change, there has also been debate about the actual extent of change. Although authors agree on rising stringency levels, the precise scope of this change remains disputed and depends on the significance attributed to forces limiting rising stringency levels. The methodology used here can contribute to this question because the numerical data is directly comparable across countries. This means that the extent of change cannot only be analysed over time but also across case studies.

8.1.1 Evidence

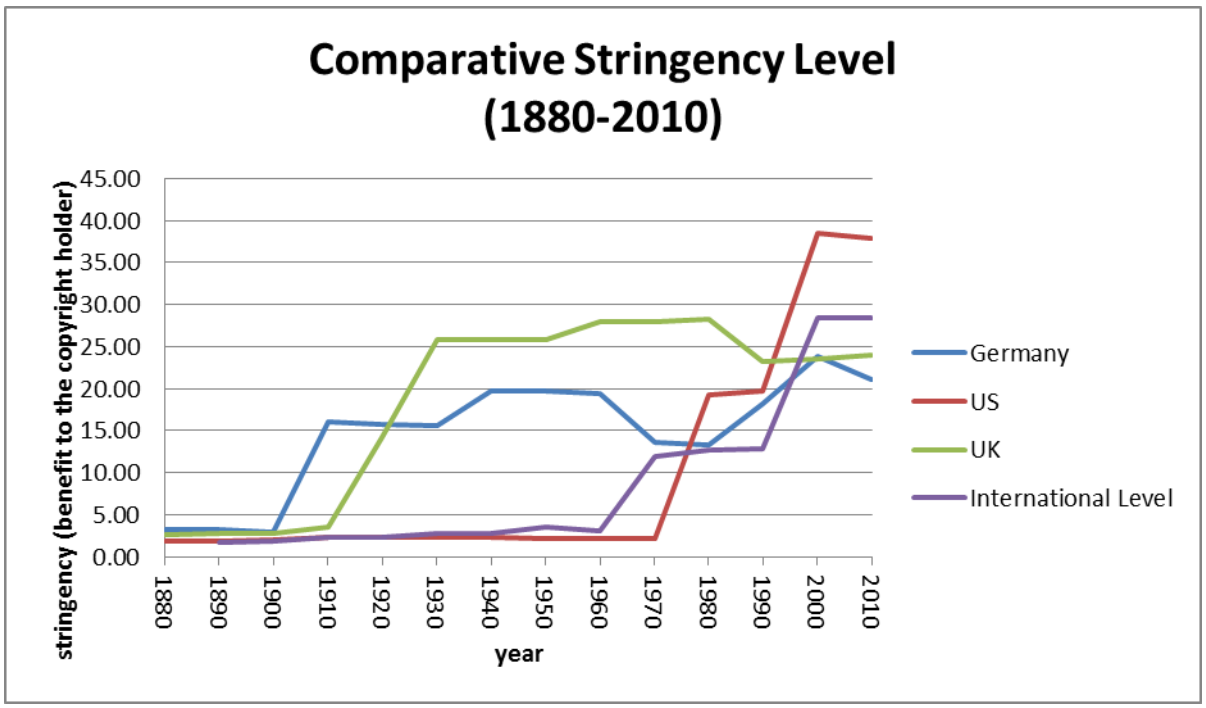

Figure 2: The overall stringency levels for Germany, the US, UK and the International Level between 1880 and 2010

Figure 2 shows that clearly all case studies examined here have seen strong rises in stringency over time. However, the extent of the increases varies across case studies. The strongest increase has been experienced by the International Level. The index rose from 1.64 in 1890 to 28.44 in 2010 which is a rise of 1634%. The second strongest increase is observable for the US (+1939%) as the score rose from 1.86 in 1880 to 37.92 in 2010. Germany and the UK have seen significantly less change.

[64] The exception is the UCC for which lower stringency levels have been identified (P. Goldstein 2003: 151- 152).

Germany expanded its scope of protection by 542%: from 3.28 in 1880 to 21.04 in 2010. Finally, the UK only raised its stringency level from 2.66 in 1880 to 24.01 in 2010 and therefore by 379%. In sum, all case studies have seen a significant rise in stringency levels over time.

These results confirm the general consensus. This was to be expected given the close link between the existing literature and the operation of the stringency concept. The methodology used here is a numerical reflection of how the scope of protection has been assessed in the legal literature. It relies on the same kind of indicators and the same understanding of how particular provisions affect the stringency level. As a result, arriving at a similar conclusion would corroborate the validity of the methodology. Given that there has been practically no disagreement on this issue in the existing literature, any contradiction by the empirical evidence would have been most likely caused by misinterpreting the concept (H. Eckstein 1975). In sum, the empirical evidence confirms the long-term trend towards rising stringency levels and in doing so corroborate the methodology.

It should be noted though that the comparative levels have changed significantly. In 1890, Germany was the most stringent with an index score of 3.28, followed by the UK (2.78), the US (1.86) and finally the International Level (1.64). This ranking is not surprising. As an AR country, Germany can be expected to provide strong protection to fewer kinds of works. Personality-based natural right reasoning lends itself to strong protections for authors.[65] Furthermore, neighbouring rights and performers did not play a role yet in 1890, so the impact of these newer work kinds is limited. These are most likely to raise stringency levels in common law countries such as the US and the UK because they are expected to treat neighbouring rights in the same way as they do copyright works. In addition, the International Level[66] was designed to only provide a minimum standard. Therefore, it is to be expected that provisions are comparatively weak.

[65] See the explanations of copyright justifications, especially The features of Author Rights and Common Law Copyright Systems in 2.3.2 Conceptualising Copyright Culture.
[66] At this point, the International Level was only made up of the Berne Convention.

However, the picture fundamentally changed by 2010. Now, the US was the most stringent (37.92), followed directly by the International Level (28.44). The UK had (24.01) while Germany provided for 21.04. The 2010 position can be explained by the US' often highlighted leadership (J. Braithwaite et al. 2000). The fact that it has seen the strongest expansion by any case study indicates how it has changed its approach to protection in practice. The International Level is also in line with expectations. Former largely omitted areas such as enforcement have entered the international stage.[67] However, it is surprising that its overall provisions are actually more extensive than those of the national case studies. Nonetheless, the main explanation is the absence of detailed exemptions which remain a national prerogative.[68] This means that copyright owners benefit from international guarantees more extensively than the users do. The comparable rise between Germany and the UK however cannot be as easily explained. Both countries did not expand the level of protection as strongly as the US did.

However, although the stringency levels increased overall, Figure 2 also shows that this trend was not continuous. There have been instances when stringency levels fell rather than rise. All national case studies have seen instances where stringency levels fell. The UK's scope of protection only expanded continuously from 1880 to 1980. It rose from 2.66 in 1880 to 28.28 in 1980. However, the protection decreased by 18% as the score dropped from 28.28 to 23.18 between 1980 and 1990. This significant fall has not balanced after 1990. The index rose again after 1990 but only to 24.01 and therefore remains 15% lower than it had been in 1880. Similar periods of falling stringency levels are also observable for the US. The US has seen a fall in stringency levels between 1940 and 1950 (from 2.38 to 2.12) and after 2000 (from 38.49 to 37.92). These are declines of -11% and -1% respectively.

Germany has also experienced significant periods of falling stringency levels. Germany' the scope of protection has been continuously expanded until 1950. The index rose from 3.28 in 1880 to 19.71 in 1950. This is a relative increase of 501%.

[67] See for example the strong on enforcement in TRIPs and the possibility of using the WTO Settlement Mechanism.
[68] See for example the debate on Information Society Directive (EU 2001) or the nature of exemptions in the Berne Convention, Rome Convention and others (Rome Convention 1961: art. 15).

However, the score started to drop by 1960 and especially between 1960 and 1970. It fell from 19.71 to 19.49 in 1960, 13.66 in 1970 and 13.38 in 1980. These are relative declines compared to the previous decade of 1%, 30% and 2%. The stringency levels have also fallen after 2000: from 23.82 in 2000 to 21.04 in 2010. This is a relative decline of 12%. Therefore, Germany has seen falling stringency levels across four decades. This is a comparatively long time, given that the study only covers 130 years and the consensus has been firmly on rising stringency levels.

In addition to the national case studies, the International Level has also experienced declining stringency levels. However, here it has been identified in the literature before. Goldstein has argued that the International Level's scope of protection has been lowered by the 1951 UCC (P. Goldstein 2003: 151- 152). This is confirmed by the data. The stringency levels fell between 1950 and 1960 from 3.61 to 3.13. This is a relative fall of 13%. However, similar predictions do not exist for the other case studies. Nonetheless, they still have experienced falling stringency levels.

8.1.2 Causes for Falling Stringency Levels

The protection at the International Level fell as Goldstein had argued between 1950 and 1960. The causes for the decline at the International Level can be directly to the UCC. The threshold of protection fell from 1.24 to 0.59 because the number of formalities increased (from 0 to 0.6) while their impact became more significant. This in turn has lowered the impact score from 3 to 1. The issue of formalities was the main aim of the UCC and it is therefore not surprising that these areas account for the change (P. Goldstein 2001: 28). In conclusion, the UCC has affected the International Level in exactly the way describes by Goldberg.

The UK's fall in protection between 1980 and 1990 was mainly caused by rising number of exemptions rather than a removal of rights. The protection for neighbouring rights fell from 11.73 to 9.9 as the number of exemptions increased from 8 to 22. Similarly, a stark rise in the number of moral rights exemptions (0 to 9) actually pushed the overall scope down from 2.13 to 0. The trend was further reinforced by weaker performer protection (down from 11.4 to 9.36). Again, the main influence here

was the rising number of exemptions: from 4 to 18. In sum, the UK has seen falling stringency levels between 1880 and 1990 because the number of exemptions has risen strongly for all types of works except the traditional copyright ones. This fall in stringency contradicts the literature consensus.

US protection fell first from 1940 to 1950 and then again between 2000 and 2010. The US first decline was caused by a rising number of exemptions for copyright works (from 2.86 to 3) which reduced the scope of protection for this kind of work from 0.47 to 0.43. In addition, the number of sanctions also fell from 1.5 to 1.29. The second in stringency between 2000 and 2010 is also linked to exemptions. The number of exemptions increased for copyrighted works (from 6 to 6.14); neighbouring rights (32 to 34) and performers (17 to 19).[69] Therefore, the data for the US contradicts the consensus on rising stringency levels twice and each time it is caused by the rising number of exemptions.

Germany's declining stringency scores had mixed causes. An increase in the number of copyright exemptions from 1.86 to 2 contributed to an overall falling stringency in this area from 0.61 to 0.58 between 1950 and 1960. The strong drop by 1970 is largely due to the reconceptualization of performers and the kind of protection they benefit from.[70] It is further supported though by the rising number of moral right exemptions (from 3 to 8) which pushes the overall moral right stringency down from 1.02 to 0.96. The continued falls between 1970 and 1980 are only caused by rising numbers of exemptions. The protection of neighbouring rights fell from 4.85 to 4.7 because the number of exemptions rose from 15 to 16. At the same time, the protection of performers was also weakened (4.63 to 4.24) as the number of exemptions increased from 14 to 16. The fall between 2000 and 2010 was also caused by the rising number of exemptions for performers, copyright works, and neighbouring

[69] There were also very small changes in the average number of conditions for neighbouring rights (5.25 to 5.24) and performers (5.06 to 5.05) but these are too small to be of significance.
[70] For a more detailed account, please see

8.2.1 Technological Works and their Impact on Stringency in this chapter.

rights.[71] In addition, the term of protection for moral rights declined strongly (kinski-klaus.de 2006): 4.85 to 2.08 which pushed the overall level of protection down from 1.21 to 0.52. In conclusion, the falling stringency levels between 1950 and 1980 and between 2000 and 2010 in are the result here of rising number of exemptions, a reduction in the term of protection for moral rights as well as bringing the idiosyncratic performer protection into line with the rest of the world.

Conclusion

Although the precise causes include one factors such a reconceptualization of kinds of works (Germany), a reform on sanctions (US) and a shorter term of protection (Germany), the dominant cause is undoubtedly the rising number of exemptions. Essentially, the number of exemptions rose so strongly that it outweighed the increases in other areas of protection. They have played a role in every instance of falling stringency levels identified here with the exception of the International Level.

8.1.3 Conclusion

In sum, the overall level of stringency has increased over time and done so very strongly. The important finding here is that the extent of change, the degree of rising stringency levels is now identifiable. The data for each indicator is directly comparable across case study and time, giving an idea of how much change has occurred rather than only referring to increases. Overall, the increases range between 379% and 1939% between 1880 and 2010. Therefore, the relative increases vary significantly between case studies. By using the available information more systematically, it was especially established that the International Level as it stands is more stringent than any of the national case studies and that the US' preference for strong protection is recent (after 1976). This confirms the political arguments about significant rises in protection. However, although the overall scope of protection may have increased, this is not the

[71] Copyright works: exemptions increased from 4 to 5.29 pushing the overall level of protection down from 0.67 to 0.51. For neighbouring rights, the scope fell from 9.41 to 8.33 as the number of exemptions increased from 20 to 27. Finally, the performers' protection declined from 9.54 to 8.48 in response to the exemptions increasing from 19 to 26.

same as a tilting balance between users and copyright owners. These claims need to be examined separately.[72]

However, there have also been significant instances of falling stringency levels in all case studies. This confirms the literature on the International Level but it strongly contradicts the consensus on the national case studies examined here. A significant amount of the recent political debates has been based on the rising stringency assumptions. However, if this is only partially true, then linked arguments such as the tilting balance between users and copyright owners may also be less extensive than previously claimed. Therefore, it is essential to examine why stringency levels have risen and fallen. The closer the overlap between the driving forces that have been previously identified as important and the empirical evidence, the more credence the political arguments can maintain.

These findings highlight that arguments about rising stringency levels cannot be fully transposed from one case study to another. The national case studies examined here are very similar in their characteristics: they are Western, industrialised nations. As such, their evolution is expected to be the most similar across time (L. Hancher et al. 2000: 272-273, 280; J. Jordana et al. 2004: 9; A. Lenschow et al. 2005: 289). The traditional copyright in terms of scope of protection divide is drawn between developing and developed countries. However, as the data shows, even among the case studies examined here the increases vary significantly. This has implications for future studies. Case studies need to be examined individually and it is invalid to make assumptions about their stringency levels. National variation is too significant to make accurate estimates. In addition, causal factors can be expected to have had a differential impact. The case studies were more similar in 1880 than in 2010. If case studies are very similar in their characteristics and the dependent variable (here the scope of protection) varies, then the effect of independent variables (causal factors) most likely varies too.

[72] The analysis can be found in 9.1 Copyright Owners v Users.

It is important to note though that the change in in US attitude and at the International Level is recent. This is especially relevant for the debate with copyright critics and developing countries. As already mentioned, there is a widespread dispute between developing countries and industrial nation about the scope of copyright. Developing countries argue that overly extensive protection will harm their economic growth because at their developmental stage, access is important. They are net importers of works, not exporters. Industrialised countries on the other hand argue that strong copyright protection is not hindering but enabling economic growth. Similar debates are carried out at the national levels between copyright supporters and those questioning the effectiveness of copyright.[73]

The comparatively recent change in US attitude supports the argument of copyright critics and developing countries that strict copyright protection is not a requirement for economic growth. The US has not seen any notable change in protection levels between 1880 and 1970 and therefore at the time when it rose to international importance. In fact, in 1970 when the debates were at their height, the comparative protection at US federal level was significantly lower than that available internationally.[74] In conclusion, the pattern of recent rising stringency levels in the US and the International Level are of key importance to the perception of copyright policy.

8.2 Causes for Change

The previous sections have show that stringency levels have increased over time but not continuously. In addition, the extent of change has varied significantly across case studies. The US and the International Level have seen stronger rises in protection compared to Germany and the UK. Given these findings, it is essential to take a closer a look at how the literature can explain these patterns.

There is a strong consensus in the literature that rising stringency was caused by technological innovation (the third proposition from Table 32). It is important to examine the effect of technology on rising stringency levels because it is so dominant

[73] These debates and their effects have been outlined in section 2.4 Stringency: The Scope of Protection.
[74] The stringency index was 2.12 for the US and 11.88 at the International Level.

in the literature. Given the strength of this consensus, it is practically already an assumption and therefore merits examination. In addition, much of the current debates about copyright reform is created by disagreement if new uses have been and should be included in copyright protection. Essentially, while copyright owners argue for an expansive view of copyright (B. Kernfeld 2011), user advocates have increasingly started to object this.[75] Tracing back how this issue has been handled in the past can therefore provide insights on how it will be most likely treated in the future.

The influence of technology on copyright stringency has been summarized well by Kernfeld. He argues that unauthorized use has always been a feature of copyright protection and most of it was the result of technological developments. These create a new way of using or exploiting a copyrighted work which had not been anticipated by the copyright owners. It therefore alters the balance between the owners and users of copyrighted material in favour of the user-the new use is not yet protected by copyright. Copyright owners react by labelling the new form of exploitation 'piracy' and lobby for enhanced protection. This in turn leads to legal change as copyright owners seek to benefit from the new uses (B. Kernfeld 2011: 218). In sum, new technology creates new uses for copyright works which are then added to the existing protection.

Technology impacts in a variety of ways. This section will first investigate how the introductions of neighbouring rights which are by definition technological works have affected stringency. It will then first examine the impact technological innovation had on existing works by examining the number of work types, economic rights, exemptions and sanctions.

[75] For an account of user resistance, please see Factors Contributing to Lower Stringency Levels in 2.4.2 The Evolution of Copyright Stringency in the Literature.

8.2.1 Technological Works and their Impact on Stringency

The main way to examine the impact of technology is to see how the archetype of technical works, neighbouring rights, have shaped the stringency of the copyright systems examined here. The second group is not a technical work as such but gained prominence because of them. New technology made the recordings of performances economically significant and these were given copyright protection as a result. In general, the expectation is an increase in stringency at those points in time when performers and neighbouring rights gain protection.

The UK has introduced the first neighbouring right, sound recordings, in the 1911 Copyright Act (UK 1911)[76] and protection for performers more than a decade later (UK 1925). In line with the expectation, the inclusion of sound recordings increased the neighbouring rights protection from 0 to 10.37. The overall stringency levels increased from 3.56 to 14.16. Therefore 10.37 of the overall 10.6 (98%) increase between 1910 and 1920 is explained by the neighbouring rights alone. Introducing protection for performers had a similar impact. The overall stringency level rose from 14.16 in 1920 to 25.77 in 1930 of which 11.27 (98%) was caused by the performers. In sum, introducing protection for performers and neighbouring rights has had a major contribution on the overall rising stringency levels.

The International Level first protected neighbouring rights and performers following the 1961 Rome Convention. The scope of protection for neighbouring rights increased from 0 to 4.04. At the same time, the protection of performers rose from 0 to 4.36. The overall increase in stringency levels at this time was from 3.13 to 11.88. This means that 46% of the overall increase can be explained by the neighbouring rights and another 50% by the performers. Therefore, 96% of the expanding protection between 1960 and 1970 can be attributed to the addition of new kinds of work. In 2010, the two work types still account for 82% of the overall scope.[77]

In the US, a similar pattern is observable for the introduction of performance and neighbouring rights. Neighbouring rights were first introduced in 1980 and the relevant index rose from 0 to 16.52. Overall, the stringency level increased from 2.12

[76] Broadcasts were added in the 1956 Copyright Act (UK 1925; UK 1956).
[77] 23.26 of the overall stringency level of 28.44.

to 19.21. This means that 97% of the change is accounted for by neighbouring rights alone. Performers only gained federal protection by 2000. Here the stringency levels increased from 0 in 1990 to 0 to 15.81. Overall, the stringency levels increased at this point from 19.71 to 38.48. This means that actually the protection for performers even reversed the trend at the time: the stringency levels would have fallen by 16% without them.

Germany is different from the other case studies: not all new additions raised the overall stringency level. The first jump in protection (Germany 1901) is the result of the protection for performers. Overall, the stringency level rose from 2.9 to 16.06 and the protection of performers from 0 to 12.32. Therefore, 94% of the overall change can be attributed to the introduction of performers. Neighbouring rights protection was introduced in the course of the 1965 Urheberrechtsgesetz. The protection for this area increased from 0 to 4.25. However, the overall stringency level did not rise but fall: from 19.49 to 13.66, despite the influence of the neighbouring rights. The reason for this lies in Germany's idiosyncratic approach to performers in 1910.

This German pattern is the result of applying the definitions consistently over time. The neighbouring right sound recording is defined here as the recording of a work and it is owned by the sound recording producer. In distinction, the performer is protected for his performance of the work. The basis of his protection is therefore him acting, singing or in some other way performing the work in question. What form this performance takes, for example video, broadcast or sound recording, is irrelevant to the definition.[78] These definitions fit the approach taken in the UK, US and the International Level without any issues. However, using them for Germany shows that Germany's solution was very different from that of the other case studies.

In 1901, Germany included the new technology of making mechanical instruments to record music. However, it granted the rights to control the recording not to the copyright owners of the underlying work or to the producer of the record. Rather, the performer, the person who sang the work, owned the rights. In terms of the definition used here, this means that the protection has to be classified as

[78] For more detail, see section in Work Types in 4.2.3 Protection of Authors and Copyright Owners.

protection for performers. However, the scope of protection granted is very extensive because it is treated as an adaption of a copyright work which by definitions has the same scope of protection as the original (Germany 1901: §2).

The 1965 Urheberrechtsgesetz then recognised performers as a separate group from the neighbouring rights and copyright works. As a result, rights relating to sound recordings were now granted to their producers (a new category of rights) while performers were re-classified into a category of their own. However, treating performers independently brought with it a strong reduction in the term of protection: from 85 years down to 25 years.[79] The result was that the stringency index of performers fell from 16.13 to 4.63. This in turn was not balanced by the neighbouring rights (4.25). Relying on consistent definitions across time has uncovered an aspect neglected in the commentaries: sound recordings until 1965 were not protected as sound recordings but as the works of performers. In sum, the lack of impact on the overall stringency levels by the introduction of neighbouring rights is the result of the idiosyncratic solution adopted by Germany. However, the protection of performers did have the expected effect.

In summary, new technology accounts for the rising stringency levels. If the pattern of major increases is compared to the areas of protection, it is clear that introducing neighbouring rights also strongly expands the scope. The one exception here is Germany but its importance should not be overrated. It adopted an idiosyncratic solution in 1910 and moved back into line by 1970. Therefore, rising stringency levels is caused by treating these innovations as copyrightable in itself. However, the protection of technological works is not the only way technological innovation affects the level of stringency. It also changes how existing works are used and therefore copyright protected.

[79] For the methodology behind converting terms of protection into years, please see 5.2 Values which explains the process and justifications in detail.

8.2.2 Technological Impact on Existing Works

Technology can affect the protection of existing works. On one hand, the owners can benefit from the new work types it creates, the new uses which are subjected to copyright (economic rights) and the enforcement via new technological measures. Users on the other hand can profit from new exemptions which are introduced to limit the effect of the technology. These theoretical considerations will now be examined in detail.

year	Germany	US	UK	International Level
1880	1.00	1.00	1.00	1.00[80]
2010	2.60	2.40	2.60	2.00

Table 33: Stringency values for work types in 1880/1890 and 2010.

The impact of technology is visible in the kinds of protected works: available work types (Table 33). In 1880, the stringency levels were at 2.66 (UK), 3.28 (Germany), 1.86 (US) and 1.64 for the International Level in 1890. By 2010, works such as unoriginal photographs, films, sound recordings, broadcasts, computer programs and databases have all gained protection. As a result, the index rose to 2.6 (Germany and the UK); 2.4 for the US and 2 for the International Level. The actual scope of protection the particular works benefit from can vary though, depending on their classification and the approach to neighbouring rights. For example, computer programs are considered literature works. They therefore benefit from the full scope of protection for copyright works. On the other hand, sound recordings are neighbouring rights. The scope of protection can therefore be weaker if the case study in question attributes these kinds of works with less importance.[81] In conclusion, rising work type scores have facilitated rising stringency levels.

[80] This value is for 1890 because the International Level was only established in 1886.
[81] For example Germany and other AR countries.

year	Germany	US	UK	International Level
1880	0.83	1.00	1.17	0.83[82]
2010	2.33	2.17	2.50	2.33

Table 34: Stringency values for economic rights in 1880/ 1890 and 2010.

Another major area is the number of economic rights.[83] The relative stringency levels here all expanded strongly as Table 34 clearly shows. Germany saw an increase from 0.83 in 1880 to 2.33; the US from 1 to 2.17; the UK from 1.17 to 2.5 and the International Level from 0.83 (1890) to 2.33 in 2010. Looking at the new additions clarifies the technological impact: they represent the shift form the physical work to the intangible copy (J. Ginsburg 1990a: 1885- 1887). One major challenge to copyright was the making of mechanical instruments. It was included in Germany, the US and the Berne Convention by 1910 and the UK by 1920. Similarly, broadcasting and other wireless transmission increasingly gained recognition: Germany (1926), International Level and UK (by 1930) and the US (by 1980). Practically all rights not covered by 1880 represent new uses made possible by new technology, with the exemption of the rental and lending rights. Therefore, economic rights do account for rising stringency levels.

year	Germany	US	UK	International Level
1880	1.07	0.86	1.07	0.43[84]
2010	1.93	1.93	2.36	1.93

Table 35: Stringency values for sanctions in 1880/1890 and 2010.

[82] This value is for 1890.
[83] The analysis focuses on the rights available for copyright works because they benefit from the strongest protection and have the most rights available to them.
[84] This value is for 1890.

Finally, Table 35 indicates that technology has also affected the enforcement area. The enforcement stringency scores have increased from 1.07 to 1.93 (Germany); 0.86 to 1.93 (US), 1.07 to 2.36 (UK) and 0.43 to 1.93 (International Level). However, the majority of these increases are not related to technology. Only the injunctions against Internet Service Providers and the Digital Rights Management (DRM) provisions are. It is noticeable that both of these are comparatively new and are designed to control digital works, especially online. These therefore could be linked to the perception of strong copyright intrusion in the digital world. In conclusion, sanctions did contribute to higher stringency levels but technology is not the only force influencing this area.

In sum, technology has contributed strongly to the changes in work types, economic rights and less extensively also for sanctions. However, while technology explains much of the change for the positive protection of copyright owners, it has played less of a role in exemptions and therefore the protection of users. Overall, the number of exemptions has strongly increased between 1880 and 2010. It rose from 1.29 to 5.29 in Germany; 1.29 to 6.14 in the US; 0.43 to 5.14 in the UK and 0.71[85] to 1.14 at the International Level. However, these rises cannot be attributed to technological change as such. Actually, there are very few purely technology exemptions. The coding schedule lists all the different exemptions that have been identifiable in any of the case studies between 1880 and 2010.[86] Among the exemptions for economic works, four exemptions are technical necessities: correct errors in computer programs, de-compilation, technical necessity and temporary reproductions. These are four out of 88 distinctive examinations and therefore only 5%. In addition, very few conditions on exemptions can be explained by technology. Only five of the potential 38 conditions which have been identified between 1880 and 2010 can represent technological specificities.[87] This is only 13% of the whole. In sum, there are very few exemptions which are driven by technical necessity.

In sum, new works, rights and sanctions were introduced in response to new technology. The result was a rise in stringency levels in all case studies and therefore a

[85] This value is for 1890.
[86] The coding schedule can be found in The Exemptions in 4.2.4 Protection of Users..
[87] Nature of the work; Information or Format not available; incidental/ part of the technological process; reproduction method; and circumvention measure.

clear expansion in the scope of protection in these areas. However, technology had significantly less impact on the number of sanctions. Nonetheless, the main explanatory gap relates to exemptions. There are very few purely technological exemptions. However, it their strong increases which are the main explanatory factor for falling stringency levels and therefore the undermining of the consensus.

As the previous section has shown, the rises cannot be attributed to technological change. However, if one takes a broader look and also includes those exemptions which are linked to technology but also political lobbying, the number increases significantly. The number rises from four to 23[88] and therefore to 26%. For performers, this affects one exemption (audio-visual works) and therefore 1 out of 12 exemptions overall (8%) and two for moral rights (audio-visual works and computer programs): 7%. This means that although the exemptions are the result of new technology, they are not necessary for the technology to work. Rather, particular groups secured them to limit the cost imposed by copyright on them, for example libraries and teaching. In sum, the number of exemptions which can be explained in reference to both politics and technology together is significantly higher than technology alone. In conclusion, technology by itself has little explanatory power when it comes to exemptions. However, linking it with political influence as represented by the narrow exemptions granted to interest groups does provide an insight.

[88] These exemptions are: Back-up copy, circumvention, coin-operated machines (games), coin-operated machines, correct errors, de-compilation, digital audio transmission, encryption research, ephemeral recordings, Library: back-up copy, Library: copy a digital work, Library: copy from the Internet, Library: make work accessible online, manufacturing of sound recordings, non-commercial broadcasting, paper reproduction, retransmission, reverse engineering, special broadcasting, Teaching: make work accessible online, Teaching: broadcasting, Teaching: record a broadcast, technical necessity, temporary reproduction.

8.3 Conclusion

This section has shown that stringency levels only partially conform to the existing consensus. It matches expectations because stringency levels in all case studies have strongly increased over time. In addition, much of these rises can be explained by the development of new work types, uses and enforcement capabilities as well as recognising technological works and other economically important contributions as copyrightable in their own right. However, stringency levels have not been continuously rising. Instead, there have been significant periods of falling stringency levels. These were caused by a number of nationally specific changes and the systematic strengths of exemptions. Their importance has been previously underemphasised in the literature and their continued strength has not been adequately explained at this point. It seems that political dynamics rather than technology have more explanatory potential here.

In sum, chapter has demonstrated two things. First, the literature is very good in explaining why the positive protection for copyright owners has changed: they successfully lobbied for the inclusion of new technology in copyright policy. However (and secondly) the explanatory power of why users continue to benefit, represented as the scope of exemptions, cannot be explained by the same logic. Very few exemptions are the result of technical necessity. Instead it seems to be that the political dimensions has been neglected in the arguments.

The neglect of the political dimension to copyright evolution overlaps with the dominant view of how copyright imposes a cost. In legal copyright analysis, the public domain denotes those uses which are not covered by copyright policy: they are outside the scope of protection (J. Litman 1990). For example, when copyright owners are granted a new right this particular use is now covered by copyright. It moves from the public domain to the copyright domain-as a result, the public domain shrinks. Similarly, when the term of protection is extended, it takes longer for copyright works to be freely usable. It takes more time for them to move from the copyright domain into the public domain. Therefore, the scope of protection is traditionally focuses on the positive protection of copyright owners, defined in the copyright right-public domain dichotomy.

This approach also means that the influence of exemptions is underemphasised. The impact the protection given the copyright owners develops in practice. Although granting new rights does impact on the public domain, it is exemptions which are key for innovation (R. Anderson 1998: 660). Clearly conceptualizing the scope of exemptions in comparison to the positive protection of copyright owners provides a more detailed picture of how the line between copyright owners and authors has shifted over time. Without it, the image is skewed in favour of assuming that copyright owners have benefited more than they actually did.

The importance of exemptions has repercussions for the perception of copyright policy. Much of the political debate has centred on the perceived continuous increase in stringency levels over time. Although this is (partially) true, exemptions have been significantly more influential than previously assumed. This in turn also means that users have benefitted more extensively than has been commonly argued. It therefore sheds doubt on the shifts between copyright owners and users and authors which have inspired much of the opposition to copyright policy. In addition, not all authors which have identified rising stringency levels have necessarily also argued that the balance of power has shift away from the users towards the copyright owners. As a result, the next chapter will examine these arguments about who has benefitted in detail.

9. The Comparative Strength of Interested Groups

Chapter eight has shown that overall stringency levels have risen strongly over time, although the trend was not continuous. One of the main causes was the importance of exemptions. Given that these benefit users in particular, it is important to assess how the benefits derived from copyright policies have been distributed. In essence, this chapter interprets the previous findings in the light of interested groups and how they have benefitted over time.

It is common to distinguish between three major interested groups in copyright: copyright owners, authors and users. Of these three, copyright owners have been identified as the main beneficiary of recent reforms. On one hand, rising stringency levels have arguably shifted the balance between corporate owners and users in the favour of the first as the available rights have been expanded example (J. Litman 1986; M. Rose 1993; J. Ginsburg 2001; J. Ginsburg 2002; J. Gantz et al. 2005; J. Campbell 2006; P. Yu 2009). In addition, they have benefitted more than the authors, despite their reliance on the romantic author discourse to justify their claims (J. Ginsburg 2001: 1646; L. Lessig 2004: 233; J. Gantz et al. 2005: 1; J. Campbell 2006: 12). However because the previous section has shown that especially the exemptions have been stronger than previously identified, it is necessary to evaluate these claims about the corporate winner in copyright reform.

This question of corporate gain is essential for the perception of copyright in public. Much of the criticism of copyright policy is more or less directly linked to the perceived undue gain of corporations. For example, arguments about the need of authors have been criticised because the actual design of policies does not benefit the individual author but the employer/ corporate owner (J. Ginsburg 2001: 1646). The opposition to copyright reforms and therefore their future trajectory is crucially depends on the role and benefit of corporations. It is therefore essential to examine if they have benefitted as much as has been argued.

9.1 Copyright Owners v Users

There is a voice in the literature focusing on the extension of copyright policy and how it has benefitted corporate owners and not the users (see for example (J. Litman 1986; M. Rose 1993; J. Ginsburg 2001; J. Ginsburg 2002; J. Gantz et al. 2005; J. Campbell 2006; P. Yu 2009). Essentially, corporations arguably dominated the political process. The main reason is their ability for effective collection action in support or opposition of particular policies.

Copyright owners are attributed with more influence in the political process because business interests can mobilise more easily. First, business organizations and especially transnational companies have an advantage in resources: more information, money and technical expertise (W. Mattli et al. 2009: 16, 32). In addition, they can mobilise more efficiently because the costs and benefits are distributed over a small group (M. Olsen 1969; W. Mattli et al. 2009; C. Veljanovski 2010).[89] Furthermore, they have less heterogeneity in their interests (F. van Waarden 2002: 44); the rewards are proportionally bigger (M. Olsen 1969); and decision-making is quicker and requires less negotiation (J. Greenwood 2002: 24). All of this reduces the transaction cost associated with collective action. In sum, copyright owners influenced policies mainly because they have inherent advantages in terms of collective action and resources.

The influence of copyright owners is facilitated by the weakness of consumer groups, especially at the international level. Opposition to business groups, in particular large corporations, will come from civil society rather than other business sectors (M. Cowles 2002) Citizen groups are in an advantage if they have a good organization and a large constituency because they can mobilize their members, offer more votes, more legitimacy and more media access (J. Berry et al. 2007: 179). However, copyright policy up to the 1990s did not trigger a broad scale public interest. Furthermore, the discourse highlighting the competitive advantages of stronger copyright protection means that the perceived policy cost was not significant enough

[89] According to Peltzman, effective group is limited due to informational and organizational costs. If a group is large, the interests of members are naturally more diverse and the individual member has a lower stake in the outcome. As a result, the benefits do not outweigh the information costs. Secondly, the cost of mobilizing resources, both in terms of money and votes, and contributing to the resources of the appropriate politician or organization rises faster than the group size. The larger the group, the higher the organizational costs and the more significant becomes the free-riding problem. Therefore, the political process limits both the effective group size and their potential gains (S. Peltzman 1988: 236).

to trigger opposition (G. Becker 1988).[90] In addition to these reasons, consumer groups failed to recognise the trends for a long time. For example, by the time consumer groups understood the importance of TRIPs, it was too late to shape the outcome (J. Braithwaite et al. 2000: 72). It was only during the 1990s WIPO negotiations that consumer protection groups actively lobbied against expanding the scope of copyright protection (J. Braithwaite et al. 2000: 64).

Counter-mobilization was also hindered by the limited openness and accessibility of the process. Due process can potentially prevent capture of the policy process because it provides inclusiveness, fairness, openness, transparency and accessibility (W. Mattli et al. 2009: 4, 15). However, especially international negotiations lack this kind of openness.[91] User and consumer groups have been particularly frustrated with their lack of access to the public policy making process on copyright (P. Yu 2009: 1). The problem is compounded by the behaviour of the courts. Once lobbyists have shaped legislation, judges are reluctant to second-guess the legislators (W. Kingston 2002: 335).

In conclusion, given the strength of business interests and the weakness of the opposing consumer ones in the policy process, the copyright owners had more influence than copyright users on the policy design.

The result of this trend was a perceived overstretching of copyright policy. It has been argued, copyright policy has been strongly shaped by the pressure of interest groups rather than an underlying coherent philosophy (W. Patry 1996: 907). Corporate interests feel threatened by technological change and therefore capture government. It is an attempt to ensure that their interests are protected (L. Lessig 2004: 6; B. Kernfeld 2011). The balance of power has shifted in their favour and away from the users or the public good (J. Litman 1986; M. Rose 1993; J. Ginsburg 2001; J. Ginsburg 2002; L. Lessig 2004; J. Gantz et al. 2005; J. Campbell 2006; P. Yu 2009). It should be noted though that this conclusion is not drawn by every author writing about rising stringency levels.

[90] For the discourse, see for example the recitals in (EU 2001: recital 4, 9)).
[91] One major example are the negotiations for the ACTA agreement which was ultimately rejected by the European Parliament.

9.1.1 Evidence

To examine if the balance has shifted between users and copyright owners, it is essential to examine the different types of works independently to see if existing works are provided with more protection over time.[92] If existing works would have gained more comparative protection without equivalent changes to user benefits, the balance would have necessarily tilted. Work type stringency is defined by five indicators. The first four benefit the copyright owners: the number of economic rights, the term of protection, the average conditions on exemptions and the number of sanctions. Users in turn benefit from the number of exemptions.[93] The individual kinds of work will now be discussed in turn, starting with copyrighted works, then neighbouring rights and performers.

year	Germany	US	UK	International Level
1880	0.56	0.62	0.62	0.15[94]
2010	0.51	0.32	0.60	1.31

Table 36: Stringency values for copyright work in 1880/1890 and 2010.

Table 36 clearly shows that the protection of copyrighted works has been subject to hardly any increases in protection. Only the International Level has strengthened the protection available for copyrighted works. Its index score rose from 0.15 to 1.31 between 1880 and 2010. This is an increase of 765%. However, the other case studies saw falling stringency levels between 1880 and 2010. The UK experienced a very minor shift towards the users as the stringency level fell from 0.62 to 0.6 (-3%). Germany also reduced the level of protection: from 0.56 to 0.51. This is a decline of 9%.

[92] Arguments on rising stringency levels focus on a particular work type: for example, one can do less with a book today than one could 100 years ago. Therefore, the analysis has to centre on exactly this: the comparative stringency across time for a type of work rather than the overall stringency level. It is not about if a work should be protected in the first place (here: threshold of protection) or the general enforcement of copyright (enforcement). The emphasis is therefore on individual work kinds because these represent the scope of protection available if one considers for example a book.

[93] For a full explanation, please see

6. Copyright Stringency.

[94] The International Level only began with the 1886 Berne Convention; therefore this data is from 1890.

Nonetheless, the most pronounced reduction is observable for the US. It lowered the level of protection by 48% as the index is declined from 0.62 to 0.32. In sum, Germany, the UK and the especially the US are providing less protection to owners of copyright works today in comparison to the users. Only the International Level has expanded the scope although it did so very strongly.

The protection of neighbouring rights has been more beneficial to the copyright owners than users over time.[95] Similar to copyrighted works, the International Level has seen the strongest expansion in protection. The index rose from 4.04 to 12.35 between 1970 and 2010. This is a rise of 206%. Germany has also expanded the scope of protection, although significantly less extensively. The index shows an increase of 72% (from 4.85 to 8.33 between 1970 and 2010). Similarly, the US also raised the stringency level: from 16.52 in 1980 to 19.05 in 2010. This is an increase of 18%. However, the UK has actually reduced the stringency. The UK saw a fall of 6% as the index fell from 10.37 in 1920 to 9.77 in 2010. In sum, while Germany, the US and the International Level raised their stringency levels for neighbouring rights, the UK reduced it.

In the area of performers, the trend has been clearly favouring the users and not the copyright owners.[96] Germany saw the strongest overall level of reduction. The index fell from 12.32 in 1910 to 8.48 in 2010 and therefore by 31%. This is not surprising given the reclassification of performers as a distinct category from copyright works in 1970.[97] The UK also saw a strong fall in protection: down by 12% (from 11.27 to 9.95 between 1930 and 2010). The US in comparison has introduced federal performers' protection very late explaining the little change overall: down by 3% between 2000 and 2010. Finally, the International Level has increased the scope of protection for performers. The index rose from 4.36 in 1970 to 10.91 in 2010 and therefore by 150%. In sum, while Germany, the UK and the US all reduced the scope of

[95] Introduction of neighbouring rights: Germany (1970); UK (1960); US (1980) and the International Level (1970).
[96] Introduction of protection for performers: Germany (1920), UK (1930), International Level (1970) and the US (2000).
[97] See explanation in

8.2.1 Technological Works and their Impact on Stringency in 8.2 Causes for Change.

protection, the International Level again favoured the owners by raising the stringency level.

9.1.2 Discussion

	Copyright Works		Neighbouring Rights		Performers	
	Increase	**Decline**	**Increase**	**Decline**	**Increase**	**Decline**
Germany		X	X			X
US		X	X			X
UK		X		X		X
International Level	X		X		X	

Table 37: Summary of stringency developments affecting the balance between copyright owners and users.

As summarised by Table 37, the individual work types do not reflect the overall strong increase in protection, except at the International Level. Both the US and the UK have reduced the scope of protection for every type of work examined here. They therefore expanded the number of exemptions more extensively than the comparative increases in economic rights, terms of protection, average conditions and sanctions combined. This is clearly unexpected.

Germany and the US followed a similar path. They reduced the stringency levels for performers and copyrighted right works. However, they provided more protection for neighbouring rights. While stronger neighbouring rights protection was to be expected for the US, it seems surprising for Germany given that copyrighted works and performers arguably should be worthy of more protection in an AR country.[98] However, the performer shift can be explained by Germany abolishing the anomaly of treating it as a copyrighted work.[99] In addition, the scope of neighbouring rights lacked behind the international standard. Despite the increases in Germany for neighbouring rights and reductions in the UK and the US, Germany has still provided less protection than them.

Finally, the International Level has strongly expanded the available protection in all areas under consideration. In addition, all increases were the strongest of any

[98] AR is based on originality and artistic ability. These characteristics are more reflected in copyright works and performers than neighbouring rights.
[99] For a full account, please see

8.2.1 Technological Works and their Impact on Stringency in 8.2 Causes for Change.

case study in question. This trend should not come as a surprise through. Users benefit from exemptions, the one weakness international agreements traditionally have. Exemptions are perceived as national prerogatives: [100] the result is vague exception clauses.

There are a number of contributing factors to the difference between the findings here and the expectation raised in the literature. The first explanation is the narrow scope of exemptions. The study here relies on a clear, mutually exclusive definition of exemptions. This approach has the side effect of highlighting how exemptions have adapted over time because it emphasises comparability. This means on one hand that it is clear how the same exemptions have evolved and how its scope has changed. However, it also highlights how certain groups of public benefit uses have gained new permitted uses. For example, the provisions on teaching or libraries have kept up with the change over time as their number increased. While these changes might be easily assimilated into existing perceptions of the scope of exemptions, by coding according to purpose these differences become clearer. Part of the explanation is therefore the increased attention to detail as a result of maintaining comparability over time and case studies.

Secondly, the difference between the findings here and the literature is a problem of scope rather than analytical content. Both the benefits for users and owners have been extensively analysed before, however, they are linked with each other. In essence, literature arguing that the balance between users and copyright owners focuses on what users cannot do anymore. They discuss in detail how copyright affects users in ways that have not been before. This is essentially the dividing line between the copyright and public domain outlined before. However, they do not pay the same attention to the new permitted uses which have gained recognition.[101] They do not spend the same effort on describing how exemptions have changed in response to new owner benefits, for example economic rights. In sum,

[100] This problem, for example, became very apparent in the EU were member states were not able to agree on exemptions in the Information Society Directive (EU 2001) Similarly, the Berne Convention, Rome Convention and others have a catch all exemption provisions, see for example (Rome Convention 1961: art. 15).

[101] See for example the discussions in: (J. Ginsburg 1990a; J. Litman 1990; J. Ginsburg 2001; J. Litman 2001; J. Ginsburg 2002; L. Lessig 2004).

although both the changes to positive protection available to copyright owners and the exemptions have been discussed before, these two components are not combined systematically. Nonetheless, all of the exemptions are known and discussed extensively in commentaries on copyright law.

The third possible explanation is the timeframe. Much of the resistance to copyright reform is recent and claims for tilting balances are especially pronounced for digital works. This is confirmed by a number of authors highlighting the detrimental impact that digital technology had on users lobbying (L. Lessig 2004; J. Gantz et al. 2005; I. Alexander 2007; B. Kernfeld 2011). In other words, it is possible that the distance between the evidence of copyright benefits and the perception is due to a digital impact.[102]

9.2 The Digital Impact on Users

The previous sections have shown that overall stringency levels increased but the impact has not shifted the balance between copyright owners and users. The question therefore arises if the perception of rising stringency, especially the acceleration of its effects on users might be linked to digital technology rather than copyright as a whole. The focus here is on the strength of exemptions, especially those aspects limiting their scope.

[102] This is outlined in 2.4.3 The Scope of Protection.

9.2.1 Evidence

Digital technology has affected the way users can rely on exemptions. Some of the exemptions have additional conditions attached to them in case that a work is in digital form. This makes compliance and therefore reliance with the particular exemption more difficult.

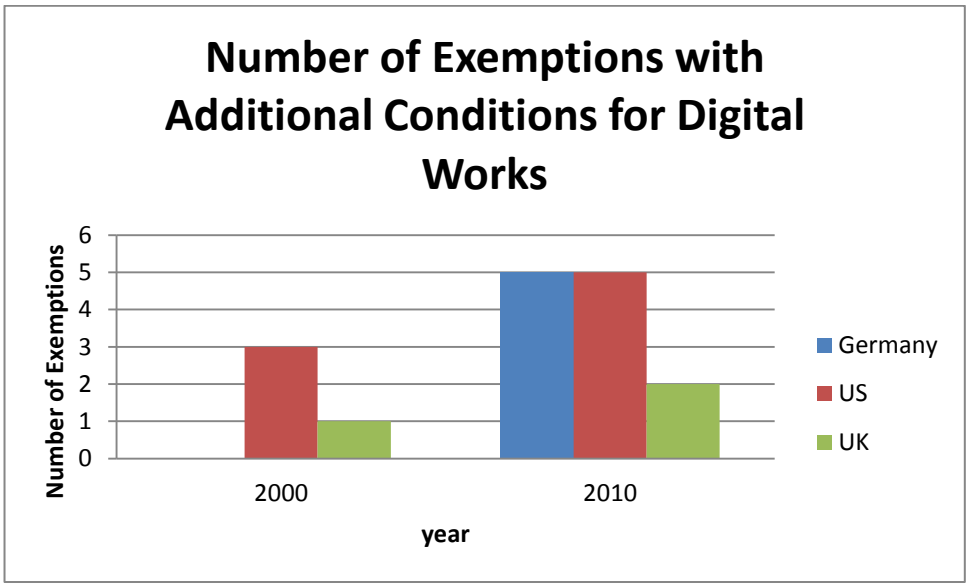

Figure 3: Number of exemptions which have additional conditions when the work is digital rather than analogue.

As the following table shows, all case studies require additional measures to be taken for an exemption to apply to the digital age. Although it made no such requirements by 2000, Germany demanded extra precautions in 24.3% of the exemptions by 2010 (9 out of 37 exemptions). It is the least technologically neutral. In addition, these special requirements also apply to exemptions commonly considered in the broader public benefit: use in schools and teaching/ research. Similarly, the US strongly increased the provisions. In 2000, only 7.1% had special requirements for digital works. This rose to 11.6% by 2010 (from 3 to 5 out of 42 and 43 exemptions respectively). The UK presents itself as the most technologically neutral in this respect. Here, only 3.2% in 2000 (1 out of 31) and 5.6% in 2010 (2 out of 36) include additional provisions. Therefore, depending on the country in question, access to digital works is potentially more limited.

Exemptions are also impacted on indirectly. The protection for DRM shifts the emphasis of what copyright controls. Before, only the actual act of copying was subject to control. DRM however can determine how a work is used, even before there is any copying. For example, the Adobe Digital Editions software lets copyright owners determine how often a book is read. At the same time, the circumvention is essentially banned irrespective of what further use it the work would have been submitted to (L. Lessig 2004: 157). As a result, certain kinds of behaviour which were formerly outside of copyright controls (or not enforced) have now entered the realm of copyright policy (J. Ginsburg 2001: 1632). It is therefore necessary to examine how many of the exemptions explicitly allow for the circumvention of DRM-a necessity in order to rely on them in the digital environment.

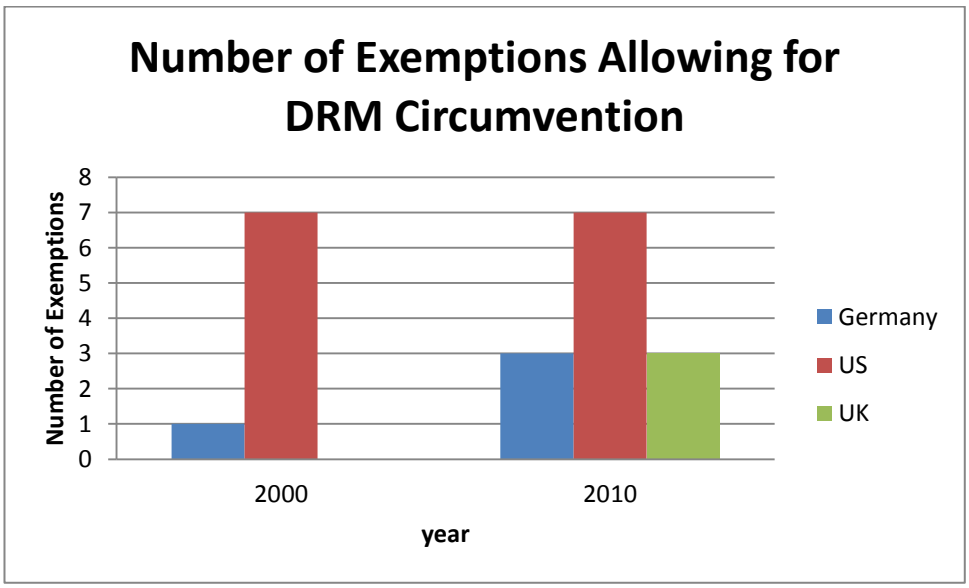

Figure 4: Number of exemptions explicitly allowing for the circumvention of DRM.

Despite the wide range of works which can be subjected to DRM, the up-front removal of it is only allowed in a minority of cases. The US has the most extensive provisions in this respect with seven exemptions explicitly catering for circumvention. However, this is only 17% of the exemptions available. The UK in turn provides for 9.7% with three out of 31 exemptions. In addition, neither the UK nor the US have any provision permitting it for private use. Therefore, strictly speaking, copying a CD onto the computer to have the mp3 files for a handheld player is now subject to

enforcement, even though it was largely ignored before (I. Alexander 2007: 654). [103] For Germany, only 2.7% of exemptions permit the circumvention of DRM (one out of the 37 possible exemptions). In conclusion, only a small number of exemptions explicitly allow for the breaking of DRM although they can be applied to all digital works. This in turn means that the other exemptions are potentially not applicable as the use of the work is prevented as a whole by limiting access rather than just focusing on copying.

To remedy the situation of preventing exemptions to apply, all case studies provide for procedures through which they can be enforced. In the US, the copyright register is tasked to review the provisions regularly (US 1976: 1201(a)(1201)(iii)). In the UK, this has to be done to the Secretary of State but it does not apply to all exemptions, especially news reporting, criticism and review (H. MacQueen et al. 2008: 197). Similarly, in Germany an administrative procedure is available to fine those copyright owners which do not make works available. However, it is limited to particular exemptions and does not include private copying (T. Fuchs 2008: paragraph 95a and 95b; M. Schaefer 2011: 225). What this means is that although private copying of for example a CD is allowed, it cannot be used once DRM applies to it. At the same time, levies still apply to blank media and copying equipment. In sum, all of these solutions are narrower than the actual copyright provisions because they are time consuming, potentially costly and are not automatic. Furthermore, Germany and the UK have restricted their substantive applicability. This means that the DRM provisions further narrow the scope of exemptions available for digital works and have the effect of making copyright exceptionally stringent in practice once a work is digitalised.

[103] Making a private copy was never actually legal; however, this was not enforced in practice (J. Gantz et al. 2005: 54).

9.2.2 Conclusion

In conclusion, there is a clearly identifiable digital impact on copyright exemptions. In particular, the scope of exemptions is more limited if works are digital because additional conditions apply to them. Furthermore, the protection of DRM and the limited circumvention possibilities limit the access to work. These findings are important because they partially explain the resistance that copyright policy has faced.

Works are increasingly used in the digital form and exemptions here are more limited than they are if the work is in analogue form. As the Internet gained prominence, more individuals were affected by provisions and the impact increasingly affected lifestyle choices. Especially criminalising such everyday activities like making an mp3 from a CD have a significant impact on how copyright is perceived and the intrusive feeling it has created in parts of society.

Secondly, these changes affect mainly the young, exactly the same group strongly reflected in the resistance campaigns. It is them who use the Internet extensively and tend to be up to date on new technology. They are also the ones infringing attitudes by using torrents in torrents and vote for pirate parties (T. Reuter ; M. Svensson et al. 2012). Therefore, by targeting activities of the young, it also them which oppose copyright most extensively.

Thirdly, much of the impact of restrictive practices here is communicated more widely, amplifying its impact. On one hand, stories about negative behaviour spread widely and reach a large number of people. The Internet does not only offer cheap copying capabilities but also real time communication and the potential of campaigning. Groups such as 38 Degrees already actively exploit the ability of the internet to connect and elicit support from a large number of like-minded individuals and use this for lobbying.[104]

Fourthly, despite the major impact the provisions had on the individual, they have not significantly reduced the problem of piracy. Infringing websites continue to operate and the number of take-down is increasing and not inclining.[105] In sum, the

[104] See for example the campaign homepage 38 Degrees (38 Degrees 2013).
[105] See for example the Google Transparency Report (Google 2013a).

findings that copyright is most restrictive for digital works has significant repercussion on how copyright is perceived, now and in the future. This in turn is likely to affect the political realm and therefore future copyright reform.

In sum, the literature has argued that there are major shifts towards copyright owners and away from users. This however can only be confirmed for the International Level. All of the other case studies have balanced the protection of users with copyright owners over time once the work had gained protection. The strong increases in stringency are not the result of protecting existing works more extensively but by adding more kinds of works to the scope of protection.[106] This is significantly different for digital works which are subject to more restrictive exemptions than analogue works.

The explanation for this difference is one of focus. While the increase in benefits for copyright owners has been described over time, less attention has been paid to the built safeguards for users and especially how these compare systematically in extent. However, there is another possible explanation which warrants examination. In essence, copyright users may be subject to more restrictive provisions in the digital world. This will be the focus of the next section.

This finding is important especially in the light of future copyright reform. As it stands now, copyright policy has lost legitimacy because it has been argued that copyright protection has benefitted copyright owners more than users. If this is not true, then significant parts of the anti-copyright camp' argument is significantly weakened. The digital impact does explain the perception of rising stringency levels among young people in particular to some extent though. However, if there has not been a shift from the users towards copyright owners, have the copyright owners benefitted over proportionally from protection in comparison to authors as has been claimed before? This question needs to be examined because it is an intrinsic part of the argument against corporations in copyright policy.

[106] For the full analysis, please see 8.2.1 Technological Works and Impact on Stringency and 8.2.2. Technological Works.

9.3 The Comparative Strength of Copyright Owners v Authors

The previous section has established that the overall balance between copyright owners and users has not shifted over time, except when works are digital. However, the conflict between users and corporations is only one side of the conflict. Copyright interests do not only vary between copyright owners and users. Copyright owners also have different interests than authors. In general, corporate owners rely on copyright to safeguard their profits (M. Kretschmer 2003: 339). For example, much of the content industry relies on a windowing strategy which requires the separation of markets. Since the 1970s/80s, they have been selling to different market segments and territories at different prices (S. Wang 2003: 9). The aim is to extract the maximum profit from a work. The model came under strain in the 1990 because the Internet makes this strategy obsolete because digitalisation reduces distance (S. Wang 2003: 9). Recent reforms nonetheless have ensured that this model remained viable. Market separation is maintained DRM, for example the zoning of DVDs (S. Wang 2003: 30). This example illustrates how the content industry has used copyright policy to ensure its business models continue to work rather than enhancing the benefit to authors directly.

The issue is also reflected in the debates about the types of works which are copyrightable (L. Bently et al. 2009: 35). These controversial works are of more importance to corporate owners than authors. The protection is based on the economic benefit and usually corporate owned. One core example here is the on-going debate about databases. In the US, a database was denied protection on the basis it lacks the necessary originality to qualify as a copyrightable work (Feist Publications, Inc. v Rural Telephone Service Company, Inc. 1991). However, the same work can get protection in the EU, even though a less extensive one than other kinds of works (EU 1996: chapter III).

In difference to corporate owners, the interests of authors are more diverse (J. Litman 1986; M. Rose 1993; J. Ginsburg 2001; J. Ginsburg 2002; J. Gantz et al. 2005; J. Campbell 2006). Kretschmer has summarised these (M. Kretschmer 2003: 338). The interests can be grouped in two categories: reputational interests and economic ones. In the first group are the economic interests of authors. They want to benefit

financially from the economic value of their work (M. Kretschmer 2003: 338). It should be noted that the economic dimension gains in importance the more successful an author becomes (E. Höffner 2010: 388). For example, reduced CD sales only affect those artists selling a large number of them and therefore only a small percentage of all artists (J. Litman 1986: 857- 904). This can put them in line with the interests of corporate, profit-oriented copyright owners (M. Kretschmer 2003: 339).

In the second category, authors want their work to be widely disseminated and be named as the author. This is the only way for them to get known and therefore gain a reputation. Furthermore, authors have an interest in creative exchange and especially the use of other works in their own (M. Kretschmer 2003: 338).[107] Projects like the creative commons and open source software confirm these interests not linked to financial return (J. Campbell 2006: 8-9; Creative Commons 2013a). In sum, copyright owners have an interest in profit and financial return while authors also benefit from wide dissemination and are concerned about their reputation.

9.3.1 Evidence

Economic exploitation and the protection of authors are two distinct areas in copyright policy. To examine this conflict, the analysis will be limited to the traditional area of conflict: copyrighted works. Here, both the authors and the copyright owners play a role which is not the case for the other areas. Neighbouring rights are not granted on the basis of originality and the owner is by the definition the employer. Similarly, the performers benefit from the performance rights, not the author who actually wrote the underlying work which is being performed. Economic exploitability is represented by the economic rights which define the protection of particular work kinds: economic rights, the term of protection, exemptions, conditions on exemptions and sanctions. Authors are protected by moral rights as well as limits on contractual terms and the transferability of rights. These ensure their economic benefit separately from that of the copyright owners.

It needs to be noted at this point that the actual index levels for copyrighted

[107] This is also commonly referred to as standing on the shoulders of giants: works are not created in isolation but rely on the work that others have done before them.

works and moral rights cannot be directly compared. They are relative to the provisions in 1880 for each indicator and therefore a higher or lower absolute value is not meaningful. However, the relative change, expressed as percentages, can be used instead.

The authors are benefitting today from the strongest comparative protection in Germany. Germany has weakened its moral rights protection in comparison to the copyrighted works as such and therefore their economic exploitability. The copyrighted works saw a decline from 0.56 to 0.51 (-9%) between 1880 and 2010 while the moral rights also declined from 1 to 0.52 (-48%). This means that authors have lost ground compared to copyright owners. At the same time, the ownership rules are now favouring authors more strongly. Although authors always had first (assumed) ownership, the presumption is stronger today. Explicit contractual terms are necessary for a work for hire to transfer first ownership (Germany 1965: §43). Finally, authors also benefit from guaranteed remuneration rights including for new uses and a number of these cannot be assigned.[108] In sum, authors in Germany have not been weakened over time. The impact of less extensive moral rights in comparison to economic exploitability has been softened by more favourable contractual and ownership provisions.

The International Level provides the second strongest benefits to author compared to copyright owners. The economic rights expanded by 765% between 1890 and 2010: from 0.15 to 1.31. Moral rights saw an even stronger increase (885%) as the index rose from 0.13 to 1.23. However the International Level provides little substance on the questions of work for hire and contract limitations. This is not indicative of strong roles for either copyright owners or authors because it depends on the member state how they fill this gap. In conclusion, the International Level does increasingly provide benefits to the authors. However, the impact is limited because both work for hire and the contractual limitations are largely omitted.

The US has not strengthened authors in comparison to employers. Copyrighted works have seen a strong fall in protection between 1880 and 2010: -48% (0.62 to

[108] There are numerous limitations here, including remuneration for cable retransmission §20b; resale right §26 or lending/ rental §27; remuneration for new uses: §32c in the in the 1965 Urheberrechtsgesetz.

0.32). At the same time, moral rights expanded by 23% (from 0.13 to 0.15). Therefore, the US has attributed more importance to authors over time than owners. However, although moral rights have been strengthened, the US has a very strong work for hire doctrine. Assumed ownership generally lies with the employer and rights are transferable (US 1976: s. 201 b) and d)). In sum, while moral rights have increased, the economic benefit is attributed to the employer by default and not author. The balance therefore has not changed over time.

The UK has a seen a widening gap between copyright owners and authors. The copyrighted works here saw a fall of protection of 3% between 1880 and 2010 (from 0.62 to 0.6) while the moral rights fell to 0 (a decline of 100%). The exemptions affecting moral rights are so numerous that they balance the positive provisions. This means that authors do not have a practical importance and are also less relevant than owners. At the same time, the work for hire doctrine provides the employers with the benefit of the doubt (UK 1988: s.11 12)). Similarly the only right not assignable is the remuneration from rentals (UK 1988: s. 93B). In sum, the UK clearly favours copyright owners as a result of stronger economic rights, a strong work for hire doctrine and few reserved rights.

9.3.2 Conclusion

In conclusion, copyright owners and authors have seen shifting balances. Generally, both the UK and the US provide significantly more benefits to copyright owners compared to authors. The comparative strength of moral and economic rights, first ownership rules and the transferability of copyright all point in this direction. In Germany, the effect is weaker because ownership and transferability rules are geared more towards authors. However, moral rights have benefited less from increases over time than economic ones. The International Level is more difficult to assess. The gap between moral and economic rights increased slightly over time. At the same time, there is very little detail on contracts and ownership. In conclusion, authors have kept up with copyright owners in Germany, but lost ground in the US and the UK. Overall, it has to be said that copyright owners are the main beneficiaries from copyright reforms.

These findings are important because they explain part of the copyright

resistance. While the users have not lost out overall, the results here show clearly that reform has favoured the economic benefits over the interests of the authors. This in turn has significant repercussions on arguments that put the interests of the authors in the spotlight but actually benefit the copyright owner rather than the author. In the course of future reforms, particular attention has to be paid to the effect that any reform has on this balance. If copyright aims at protecting authors and not simply protect business interests, more emphasis needs to be placed the benefit that authors actually get. For example, strengthening remuneration rights or contractual protections can remedy the changes.

9.4 Conclusion

This chapter focused on the distribution of benefits derived from copyright policy. While the previous chapter had established that stringency levels had risen and therefore more economic value benefitted from protection, its findings of significant changes to exemptions necessitated the examination of the actual distribution of these gains. Given that the literature focuses especially on the interest and gain of corporations, their relative benefits compared to users and authors was examined.

The empirical evidence derived from the methodology has shown that the economic benefit attributed to corporations has been more limited than expected. Corporations did benefit more from gains in protection than authors. These are given comparatively few prerogatives and the contractual limitations do not remedy their bargaining power. However, corporations have not caused a similar shift away from users. Rather, the relative benefit of corporations and users has remained in balance between 1890 and 2010. The only exception is digital works: here, the conditions which apply to exemptions and the role of DRM have reduced their scope.[109] This is to the determinant of the users.

The findings are important because the perception of shifting balances has been a strong argument against copyright protection in its current form. Independent of the actual evidence, the perception of corporate gain at the expense of users has

[109] For more detail, please see 9.2 The Digital Impact on Users.

created opposition. As Ginsburg noted, it is the perception rather than the facts which creates this effect (J. Ginsburg 2002: 7- 8). This is reinforced by the loss attributed to authors at the hand of these corporations. However, given that users did not actually lose out as much as previously thought, their arguments do not match reality. Instead, their reliance on the needs of authors to back up their own claims emphasises that authorial claims to copyright are the only politically viable argument. Both authors and user rely on the rights and damages done to authors to justify their own policy preferences. This emphasises that the only morally acceptable point at this time on which all major groups agree is that the authors have a right to benefit from their work in some way and that users and corporations are currently harming it.

10. The Importance of Culture

While chapters eight and nine discussed the evolution of stringency and its distributary effects in detail, this chapter focuses on culture. The literature on convergence argues that copyright systems have converged into some kind of hybrid systems (F. Grosheide 1994: 204; J. Sterling 2003: 17; H. MacQueen et al. 2008: 41; S. von Lewinski 2008: 63). This pattern is based on a number of implicit assumptions which Table 38 summarises.

	Proposition	**Explanation**
7	Older copyright policies will show the strongest link to the traditional cultural approach.	Legal traditions and therefore the closeness between a policy and the respective traditional approach are most pronounced in earlier stages of the policy.
8	Copyright policies have moved way from their respective ideal types over time.	Copyright policies have become hybrids over time, moving away from their traditional approaches to copyright.
9	Copyright policies have become increasingly settled over time in how they perceive the purpose of copyright time.	Copyright policies have become more coherent over time and therefore across the different policy areas.

Table 38: Extract from Table 1, summarising the underlying propositions of cultural convergence.

First, legal tradition needs to be important early on in the timeframe. If copyright policies are based on historical systems, then the further back one goes, the more clearly traditional attitudes should be reflected in the policies. Secondly, the case studies have moved away over time from their ideal types. As a result, their cultural scores should move towards the neutral level of three. Thirdly, being a hybrid is not limited to the overall pattern, but also the individual dimensions. In particular, as specific features such as moral rights spread, there is not an expectation that these changes are fully integrated into policies. As a result, the coherence of the systems falls. This chapter will examine these assumptions in turn and assess how they link to the general convergence hypothesis.

10.1 Legal Origin

It has been argued in the literature that legal tradition affects copyright as much as it does other policies. Examining the role of legal traditions is important because it influences how the copyright evolution is perceived. At this stage, it has been argued that copyright systems have converged over time on some kind of middle ground (F. Grosheide 1994: 204; J. Sterling 2003: 17; H. MacQueen et al. 2008: 41; S. von Lewinski 2008: 63). Although the extent of convergence is debated, they all agree that the systems have moved away from the ideal types and turned into hybrid systems instead. This basic pattern underlies all further arguments about how copyright systems have developed. For example, the bridging influence of the Berne Convention or other international agreements (G. Davies 2002: 335; P. Goldstein 2003: 152; H. MacQueen et al. 2008: 43; S. von Lewinski 2008: 34; P. Goldstein et al. 2010: 14) requires convergence to be feasible. Similarly, the Americanisation of copyright (J. Braithwaite et al. 2000: 66) is also based on the assumption that the US approach has been transplanted to other case studies and therefore converged in these aspects. However, if the case studies do not systematically vary in 1880, then the assumptions on convergence have to be at least re-examined if not dropped. It should be noted that if there is any variation and it cannot be adequately explained by the detailed historical accounts, then the methodology would have to be re-examined.

Legal traditions refers to the historical attitudes on the nature and role of the law; its role in the society and polity; the organisation and operation of a legal system; and on how law should be made (J. Merryman 1985: 2). In Europe, the distinction is commonly made between common law and civil law. It is this tradition which shaped the copyright ideal types. As the 2.3.2 Conceptualising Copyright Culture described, there are two distinct approaches to copyright policy: AR and CL.[110] Given the link between legal tradition and the ideal types, they can be used as proxies for the importance of legal origin.

In theory, legal tradition should be more important earlier in the timeframe. Von Lewinski points out that the clearest differences between the systems were visible

[110] For a full explanation of how these ideal types are conceptualised and operationalized, please see 7. Copyright Culture.

in the 19th century (S. von Lewinski 2008: 37). Similarly, Sterling highlights that the differences were clearly established by 1886 when the Berne Convention was signed (J. Sterling 2003: 15). Legal origin will therefore be more important early in the timeframe, especially 1880. To investigate the importance of legal origin, the focus will be on the earliest time point: 1880. Each case study will be examined in detail on how it relates to its respective ideal type and what explains the position.

10.1.1 Evidence

Table 39 summarises the scores for 1880 for all four case studies.

Country	Act Structure	Justification	Originality	Focus of Protection	Emphasis of Protection	Ownership	Scope of Protection	Protection of NR[111]	Formalities	Protection of Foreigners	Contract-Ability	Overall Cultural Score
Germany	3.0	3.1	4.0	1.0	3.6	3.0	3.1		3.5	3.3	3.4	3.1
US	2.0	2.6	1.0	1.0	3.0	4.0	3.0		1.0	1.0	2.6	2.1
UK	3.0	3.0	1.0	1.0	3.5	2.0	3.5		2.5	2.3	3.2	2.5
International Level	3.0	3.4	3.0	3.0	3.2	3.0	3.8		5.0	4.3	3.2	3.5

Table 39: Cultural scores for the copyright systems of Germany, the US, the UK and the International Level in 1880.

In 1880, the UK was significantly further away from CL than expected. Its score of 2.5 is in fact closer to 3 than 1. Overall, it is not clearly favouring the CL approach even at the dimensional level: six have scores below 3 and five are at or above 3. Only the level of Originality and the Focus of Protection are ideal types (score: 1). These scores were to be expected because the low originality levels required in the UK have been discussed before (W. Copinger et al. 1915: 52).

The details of why the UK shows such a significant variation to its ideal type have been describes in the past. Core CL features such as numerous constitutive formalities are absent though. Instead, in the UK they are few in number and only

[111] Neighbouring rights were not invented yet in 1880. As a result, this dimension is omitted until 1920 when the first neighbouring rights gained protection.

affect the enforcement of copyright. Secondly, there is a significant underlying current of Locke's Labour theory in the discourse of UK, copyright policy.[112] This reflects a natural right approach which provides a stronger claim to protection than a statutory privilege does (M. Rose 1993). It is therefore not surprising that the author is given added importance, as indicated by the Emphasis of Protection (score 3.5). The same logic also explains the rather expansive protection given to copyright owners (Scope of Protection: 3.5).[113] In sum, the CL approach to copyright is not fully reflected in the data at the earliest time point examined here. This is largely caused by the importance attributed to the author and the limited role of formalities. The reasons for this have been previously identified by other authors although their importance for legal tradition have not been recognised.

Germany in 1880 has a cultural score of 3.1 which at first also seems to be far away from AR (score: 5). The majority of areas score between 3 and 3.5. Only Originality is clearly AR in nature with a score of 4. By drawing on the particular components outlined in the literature, the result is far less surprising though. Germany in 1880 recognised copyright as a natural right. However, this focus did not mean that protection was to be all-inclusive and perpetual. Rather, the incentive approach was always important and is reflected in the inclusion of exemptions[114] and long-standing restrictions in the term of protection (G. Davies 2002: 182- 183).

In addition, a work is not understood in the Hegelian sense yet: the focus is still on the physical copy, not a broader understanding of work. The Emphasis of Protection only scores a 1 and is therefore an ideal CL type. The limited understanding of authorship is also reflected in the approach to moral rights protection. They were only protected by case law in 1880 and only formally codified in 1965.[115] Furthermore, moral rights are not dominant in the German tradition: the moral and economic aspects of copyright are one unified right (monistic approach to copyright) (W. Bappert

[112] See especially Rose on the battle of the booksellers and copyright at common law (M. Rose 1993).
[113] The discourse provides justifications that authors should be given strong rights. These in turn benefit the employers but they are not at the forefront of considerations when protection is extended. See section on discourse in 2. Literature Review: Justifications in 2.3.2 Conceptualising Copyright Culture.
[114] Interestingly enough, Davies also points out that even France debated the public interest in a positive sense (G. Davies 2002: 183).
[115] Even France, the ideal author rights case study commonly used for comparisons, has not codified its moral rights until 1957.

1962). This is less than the dualistic approach exercised by the French which provides for perpetual rights. Given these limitations already pointed out in the literature, it is not surprising that Germany was practically neither CL nor AR in nature by 1880. Their relevance for the cultural stance was not recognised though.

The US' approach in 1880 is as expected. The culture score is 2.1 and therefore comparatively close to its ideal type. The distance is 1.1 compared to the CL ideal type and 0.9 the neutral level 3. Overall, seven dimensions are below 3 and only three are above it. In addition, there are four ideal types: Originality, the Focus of Protection, Formalities and THE Protection of Foreigners. All of these should not be surprising. The incentive to create justifications dominated the discourse in the US. The Constitution, case law on fair use as well as secondary literature all refer to this.[116] It is therefore to be expected that the copyright focuses on the physical copy of the work. Locke's argument however on a right to copyright is significantly less prevalent.[117] Without a rights-based understanding, there is not an incentive to move away from low originality levels and narrowly focused rights.[118] In sum, the US is CL in nature as the literature had predicted.

In 1890, the International Level is close to the neutral level but with an AR tilt. The score of 3.5 and therefore the distance to the ideal AR is 1.5. All individual dimensions are at or above 3. Therefore, none of them has a tilt towards CL. Interestingly enough, it is actually more AR in nature than Germany. The tilt towards AR was predicted in the literature (G. Davies 1995: 1-2). The literature highlights that the two important innovations in the Berne Convention was the absence of formalities for foreigners and the national treatment clause. Both Formalities and the Protection of Foreigners score an ideal AR score (5). Finally, the overall neutral level reflects the need to bridge the AR-CL gap (G. Davies 2002: 335; P. Goldstein 2003: 152; P. Goldstein et al. 2010: 14). Four individual dimensions are exactly neutral in their

[116] In fact, *because* the Constitution itself refers to the utility justification, all sides need to refer to it.
[117] This is a direct result of the constitution and its reliance on the incentive approach. The intent of the legislator is very clear.
[118] The concept of a broad underlying work like in Hegel is linked to the author as a personality. Similarly, the right of the author to benefit implies that he is entitled to all the fruits of his labour. Both of these arguments open up the path for control over derivative works (W. Bappert 1962).

adopted solution. In sum, the International Level is as predicted: neutral with a slight AR bias because of the Berne Convention.

10.1.2 Conclusion

The results for the four case studies examined here show that the case studies do vary systematically depending on their ideal type but these are not as important as expected. Rather, Germany, the UK, the US and the International are all closer to the neutral level of 3 than their respective ideal types.

Although these findings seem to be unexpected at first sight for Germany and the UK, this should not be the case. All of the factors affecting the case studies have been identified in the literature before. Issues such as the importance of authors in the discourse; the role of formalities and foreigners and the question of originality have all been discussed before in some detail. However, these findings were not applied to the conclusions drawn in the AR-CL literature. As a result, their systematic implications on how the different areas of protection link with each other have been underemphasised.

One note of caution has to be added here. This study starts in 1880 and therefore decades after the first copyright laws in Germany (1837), the US (1790) and the UK (1710) were implemented. It is possible that the case studies have already dropped their particular ideal type features. However, on the basis of what has been researched on this issue before, doubts need to be articulated. In respect to the US, Ginsburg has demonstrated how the first copyright act was less CL in nature than expected (J. Ginsburg 1990b).[119] As for Germany, the first copyright law was Prussian (1837). It is therefore not long before the start of the timeframe for this study. Nonetheless, only a systematic examination of all case studies from their first copyright laws onwards with the methodology used here can provide a definitive answer to this question. However, this is outside the scope of this study.

[119] The findings from the Statute of Anne used the illustration example in Part 2 cannot be used to draw any conclusions because its sample values have been compared to the US and German provisions in 1880 and therefore 170 years later. This biases the results.

Given that legal traditions were not as prominent in 1880 as previously assumed, the question arises if the case studies have nonetheless become hybrids over time. A hybrid in this sense would show a score closer to three and probably more variation between dimensions.[120] These two indicators will now be discussed in turn.

10.2 The Importance of Ideal Types over Time[121]

The previous section has established that the notion of ideal types and therefore legal tradition had some bearing on the case studies, however, not as extensively as expected. This now raises the question that if the case studies still move away from their respective ideal types as has been argued in the literature?[122]

Examining the question of ideal types over time is important for two distinct reasons. First, it is a prerequisite for the kind of convergence identified in the literature. If the case studies have not moved away from their ideal types, then they have not become hybrid systems. This does not exclude the possibility of convergence as such. However, it means that the convergence between two systems would have not been a balanced sigma-convergence, triggered by both case studies moving towards each other on some kind of hybrid-system centre ground. Secondly, the contributing factors to convergence, such as the role of individual actors or technology arguably have worked in the form of sigma-convergence. Therefore, if the case studies did not move away from their ideal types, the effect of these contributing forces also has to be reassessed. In sum, it is important to see if case studies have moved away from their ideal type because it is a fundamental assumption in the sigma-convergence arguments and the causal factors which have contributed to it.

The position of case studies relative to the ideal type is reflected in two values. The first one is the absolute distance to the ideal type. In addition, its movement over time will also be measures by the convergence rate. This describes the relative change in position between two consecutive points in time. The

[120] They are assumed to become hybrids because specific features are imported rather than widespread change. As a result, change is assumed to be limited to particular dimensions as well.
[121] This section has been accepted for publication by the journal *Script-ed* in abridged form.
[122] This has been discussed in the literature review, in particular in 2.3.4 The Convergence of Copyright Culture.

$Convergence\ Rate = x_{t2} - x_{t1}$ where x describes the distance to the ideal type at the t_2 and t_1. If this rate is positive, then the system has diverged. However if it is negative, then the systems have converged. The convergence rate is used here because it does not only show the direction of movement but also how strong the trend it. The higher the convergence rate, the more pronounced is the trend in question.

To examine this question, the case studies will be examined individually. For each of them, its relationship with its respective ideal type will be discussed in detail. The focus will be on identifying the intervals when they have converged or diverged from it.

10.2.1 Evidence

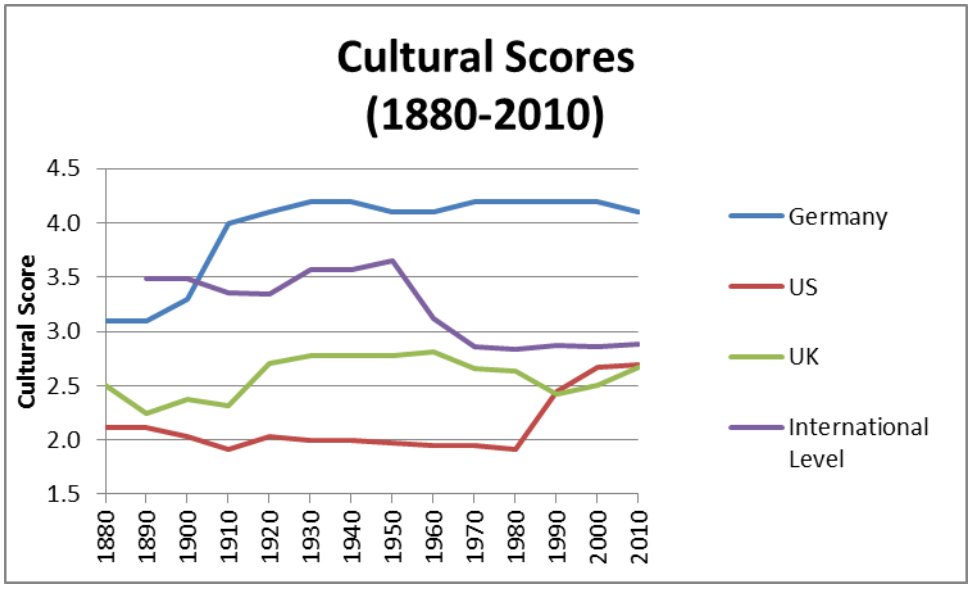

Figure 5: The evolution of copyright culture in Germany, the US, UK and the International Level between 1880 and 2010.

UK

The UK is a common law country: its ideal type is therefore CL. This means that rising scores indicate divergence while falling ones show convergence with the ideal type. Therefore, rising cultural scores corroborate the hypothesis of less important ideal types while falling ones contradict it.

The UK did diverge overall from its ideal type between 1880 and 2010. Its score rose from 2.5 to 2.7. However, Figure 5 emphasises that this trend was not continuous but characterised by significant periods of convergence. The UK's cultural evolution can be divided into four intervals: 1880-1910; 1910-1960; 1960-1990 and 1990-2010. The continued reversals mean in practice that the trend is more like an oscillation than a sustained trend in any particular direction.

In the first interval, the UK has fluctuated but overall converged with its ideal type (CL). The cultural score fell from 2.5 in 1880 to 2.3 in 1910. The distance to the ideal type therefore declined from 1.5 to 1.3. It should be noted though that there was a short-lived divergence between 1890 and 1900 when the score increased from 2.2 to 2.4. This means that the earliest interval was characterised by an overall convergence and therefore contradicting the divergence hypothesis.

After 1910, the UK's copyright system shifted away from the ideal CL type until 1960. The cultural scores rose from 2.3 (1910) to 2.8 in 1960. The distance to the ideal type therefore also increased: from 1.3 to 1.8. The development is caused by a single event. The convergence rate for 1910-1920 is positive with a value of 0.5. The shift is therefore not indicative of a long-term readjustment. Rather, the data points to the importance of the 1911 Copyright Act which dominated the whole interval. In sum, the second interval provides support for the divergence hypothesis.

The UK converged with its ideal type between 1960 and 1990. The cultural score fell from 2.8 to 2.4. As a result, the distance to its ideal type decreased from 1.8 to 1.4. Looking at the convergence rates clarifies that the trend was continuous: they range from 0 to -0.2. In summary, the period from 1960-1990 has seen sustained convergence. This does not confirm the literature's divergence prediction.

Finally, the UK reversed its cultural trend after 1990 and diverged from its ideal type. The score rose from 2.4 in 1990 to 2.7 in 2010. Therefore, the distance to its ideal type increased from 1.4 to 1.7. The convergence rates clarify that the divergence has been continuous: the rates are 0.1 for 2000 and 0.2 for 2010. In conclusion, the final two decades have seen a divergence again. This is line with the literature which predicted a shift away from the ideal type as they lose importance.

In conclusion, the hypothesis of divergence from its ideal type can only be partially confirmed in respect to the UK. The UK did diverge overall from the ideal type as predicted. However, there were periods of convergence between 1880 and 1910 as well as from 1960 to 1990. Furthermore, the numerous reversals of trends means that the overall extent of change is limited. It has only moved by 0.6 between 1880 and 2010. The most appropriate description for the UK is therefore oscillation rather than convergence or divergence.

US

The US is a common law country and therefore needs to be compared to the CL ideal type. This means that rising cultural scores indicate the divergence that is predicted in the literature. On the other hand, falling scores show convergence.

The US overall meets the expectation raised in the literature: it diverged from its ideal type. Its cultural score increased from 2.1 in 1880 to 2.7 in 2010. The distance to its ideal type rose accordingly from 1.1 to 1.7. The cultural scores remained stable for long periods of time though. It remained at 2 between 1920-1960; 1.9 between 1970-1980 and 2.7 between 2000 and 2010. In addition, the divergence has not been continuous. The convergence rates vary from -0.1 to 0.5. There are two intervals of convergence as Figure 5 illustrates.

The first convergence phase was early on (between 1900 and 1910). Here, the values fell from 2 to 1.9. The distance to the ideal CL correspondingly declined from 1 to 0.9. However, the time-frame is very short: only one decade. Therefore, not too much importance should be attributed to this short term drop. It is important to note

though that 1910 is exactly the point in time when the 1909 Copyright Reform first appears in the data.

The second fall in scores is between 1960 and 1970. They drop from 2.0 to 1.9 which reduces the distance to the ideal type from 1 to 0.9. This does not corroborate the divergence hypothesis. However, the change observable here is very small (only 0.1). Furthermore, the trend is more than reversed by 1990. The score rose from 1.9 in 1980 to 2.4 in 1990. This is higher than the previous level of 2 (1920 until 1970). The impact of this convergence phase is therefore limited in scope and time.

In conclusion, the US has diverged overall. There are two minor convergences but these are limited in time and change in score. Most importantly though, the US remained remarkably stable and actually did not evolve for most of the timeframe. The dominant trend in the US was less evolution than cultural inertia.

Germany

Germany is a civil law country and therefore its ideal type is AR. As a result, falling scores here indicate divergence and rising ones convergence. To meet the literature assertion of less important ideal types, Germany's cultural scores need to decline.

A look at Germany's cultural evolution in Figure 5 clearly shows a move towards AR between 1880 and 2000, followed by a minor shift to CL by 2010. These will now be examined in turn. Germany's evolution was a stable long-term trend towards AR. It converged from 1880 until 2000 as its cultural scores rose from 3.1 to 4.2. The distance between AR and the Germany fell accordingly from 1.9 in 1880 to 0.8 in 2000. This means that it essentially shifted away from the largely neutral level to becoming profoundly AR in character with a score higher than 4. This long term convergence strongly contradicts the literature. The ideal type for Germany has become more important and not less.

It should be noted at this point that there has been very little movement during the Second World War. First of all, there were no reforms in this time period. The last

statutory copyright reform was the extension of protection in 1933. As a result, the score remained stable and only fluctuated between 4.2 and 4.1 (1940-1950).[123] This indicates that copyright is a peace time issue in Germany and not subject to reform at a time of war.

Germany has seen a divergence from its ideal type between 2000 and 2010. Its cultural convergence score dropped from 4.2 to 4.1. As a result, the distance to its AR ideal type has increased from 0.8 to 0.9. Germany had not really evolved since 1930, despite a series of reforms including the introduction of neighbouring rights.[124] Therefore, any movement is noticeable. The importance of this shift should not be overrated though. 0.1 is a very small change and does not reflect a change in attitude. In addition, the study ends in 2010. This means that it is not clear if the trend continuous or was limited to a single decade. Furthermore, Germany is still significantly AR in nature. The recent developments are in line with the literature because the cultural score fell. This means that the system moved towards the neutrality and away from AR. However, the importance of the change is limited at this stage.

In conclusion, the German cultural evolution contradicts the literature. On one hand, It is closer to its ideal type in 2010 than it was in 1880. The AR ideal type has therefore gained importance and not lost it as the literature argues. The divergence observable after 2000 does confirm the hypothesis. Nonetheless, it is very limited in scope if it is compared to trend overall. As a result, the argument that the ideal types are less relevant today has to be rejected for Germany.

[123] The methodology depends on the maximum values present in the sample as a whole to control for the impact of rising stringency. As a result, it is possible that values change without domestic activity.
[124] The one exception is the short-lived fall in score from 4.2 to 4.1 in 1960 which was reversed by 1970. The trigger here was the UK's introduction of neighbouring rights which changed the indicator environment. It is therefore only of indirect importance to Germany.

International Level

In terms of cultural evolution, the expectations vary for the International Level. The Berne Convention was the only multilateral treaty between 1890 and 1950. For this timeframe, the cultural scores should indicate AR (G. Davies 1995: 1-2). However, it should be very close to the neutral level of 3 because it bridges the gap between CL and AR (G. Davies 2002: 335; P. Goldstein 2003: 152; P. Goldstein et al. 2010: 14). In addition, after 1950, the shift should clearly go to CL because new treaties reflect CL considerations (UNESCO 1951; Rome Convention 1961; WIPO 1996).[125]

Overall, the convergence score for the International Level dropped from 3.5 in 1890 to 2.9 in 2010. However, as Figure 5 shows, this hides that the international evolution is mainly made up of two phases: the Berne Convention and the spread of other international agreements.

Early copyright developments at the international level are entirely shaped by the Berne Convention: it was the only relevant multilateral agreement in existence until 1950.[126] In this timeframe, the convergence score rose from 3.5 in 1890 to 3.7 in 1950. The distance to the ideal type AR therefore fell from 1.8 to 1.3. The trend was largely shaped by the 1927 Rome revision: the score rose from 3.3 to 3.6 between 1920 and 1930 (convergence rate: -0.3). In line with the expectation about the nature of the Berne Convention, the system is a mixture of CL and AR with a leaning towards AR. In sum, early developments confirm the literature as the Berne Convention pulls the International Level closer to AR.

The second part of the evolution is characterised by the proliferation of international agreements. The scores dropped from 3.6 in 1950 to 2.9 in 2010. The distance to the ideal AR increased from 1.4 to 2.1. The trend was not fully continuous though. The strongest decline in score occurred between 1950 and 1960 with a convergence rate of 0.6 as the score fell from 3.7 to 3.1. The timing isolates the UCC as the driving force because it is the only addition to the data in this decade. With the exception of 1980, the remaining scores are all at 2.9. In 1980, the score dropped from

[125] For example, the permission for formalities in the UCC and the neighbouring rights introduced by the Rome Convention.

[126] There were other multilateral conventions in the Americas but none of the case studies were members and the provisions were not actually any stricter.

2.9 to 2.8. This means that 1980 has seen a minor, short-lived change with no longer-term significance. The dominant trend is inertia and therefore the absence of change. The values stayed largely stable. The falling scores match the literature which highlighted that with the Berne Convention losing its predominance, CL characteristics became more prominent.

In summary, the International Level is at a large distance from both AR and CL. Also, its tilt has reversed over time. The Berne Convention had an identifiable affinity with the AR system while the proliferation of international protection made the system more CL in nature. Overall, this meets the literature's expectations and is therefore not surprising.

10.2.2 Conclusion

The general argument in the literature here is that the ideal types lost importance over time although there is not any agreement on the extent of this. However, the evidence for this is mixed. On one hand, the two CL case studies UK and US have diverged overall and moved closer to the neutral level. Nonetheless, both of them always remained on the CL side of the spectrum. Germany on the other hand actually moved closer to its type. The fact that divergences focus on CL case studies could be merely coincidence: the number of case studies is too small to draw any definite conclusions. Therefore it is not possible to generalise on how other case studies would behave.

The second major observation is that the maximum movement varies significantly among case studies. Germany has seen the most change as its cultural score rose from the 3.1 in 1880 to 4.2 in 2000. This is a change of 1.1 and therefore more than a whole category on the AR-CL spectrum. The International Level is very close to this: 0.9 overall. The highest value was 3.7 (1950) and the lowest 2.8 (1980). The US has seen the third most extensive shift. Its minimum score was 1.9 (1910) and the maximum 2.7 in 2000 and 2010. It therefore has evolved by 0.8 over time. However, the UK has only seen a maximum change from 2.2 (1890) to 2.8 (1930) and therefore of 0.6. The continued reversal of trends as the copyright system oscillated

explains this. The average change of all case studies together was 0.9. Not a single instance in any of the case studies shows such a strong evolution at once. This is an indicates that culture changes incrementally over time. The cultural approach is not redefined at once. Instead, it is path dependent: past choices affect the (perceived) reform options available to policy-makers.

Given the absence of one sustained trend, two questions are raised. First, how do these fluctuations influence the coherence of the copyright systems. Hybrids cannot only be identified by their overall scores but also the distance between the individual dimensions: the coherence of their copyright approach. Secondly, have case studies actually converged over time despite these fluctuations? Convergence does not necessarily require that systems move to the centre because theoretically, the convergence point can be anywhere on the spectrum. However, the oscillation of case studies as they move to and away from their ideal types makes convergence with each other significantly more unlikely.

10.3 Coherence of the Copyright Systems

The previous section has traced the developments overall and demonstrated that case studies have converged and diverged with their respective ideal types. There has not been one continuous trend rather the cultural scores have oscillated over time. In addition, although the US, UK and the International Level have become hybrids according to their overall cultural scores, Germany has not. This merits a closer examination of how these changes link to the individual dimensions level.

The question of coherence, meaning the variation in scores between the individual dimensions, is a key aspect of examining the strength of legal tradition. Cultural values, represented here by legal tradition, are especially strong if they play a role in policy. Although they are not static over time, their strength affects the likelihood of change (A. Lenschow et al. 2005). For example, if a case study has based its protection consistently on the personality of the author, then the introduction of neighbouring rights is less likely than in a system which has recognised both the personality and the economic importance of works as justifications. The change in

attitude required in the first case is larger than in the second, making change less likely (L. Hancher et al. 2000: 272-273, 280; J. Jordana et al. 2004: 9; A. Lenschow et al. 2005: 289). In sum, examining the coherence of copyright system sheds light on the strength of the motivation behind the approach. It therefore also identifies those case studies were the overall cultural position is the result of widely varying positions in the individual dimensions. These are the true hybrids.

It has been argued that copyright systems have become hybrids over time (F. Grosheide 1994: 204; J. Sterling 2003: 17; H. MacQueen et al. 2008: 41; S. von Lewinski 2008: 63). This is linked to the introduction of particular features from other respective other culture. For example, a CL introducing moral rights or an AR country introducing neighbouring rights will make them hybrids. However, there is not an assumption in the literature that these changes follow a coherent vision. In practice, this means that the systems become less coherent over time as only some areas are affected.

To analyse if a copyright system is consistent in its approach to copyright, the differences between the individual dimensions, and therefore the spread of the distribution, have to be compared. If reforms followed a coherent vision, then the differences between the individual dimensions will have been reduced. They will have similar or even identical scores in the individual dimensions because the ideal types represent a common understanding. They are based on the assumption that the underlying justifications for protection affect the design of copyright policies. As such, all individual dimensions are linked in how they relate to the purpose of copyright.[127] However, if reforms are short-term fixes and only designed to handle a narrow issue, it is likely that the differences between dimensions will increase over time. Therefore, examining the differences between dimensions can show if the copyright systems have settled over time on one understanding.

There are a number of different ways to analyse the spread of a distribution. The variance and standard deviation are most commonly used but they are not appropriate in this particular case. The variance is the sum of all differences between the individual values and the mean (μ) squared.

[127] For a detailed description of the ideal types and its individual dimensions, please see 7. Copyright Culture.

$$variance = \sum (X - \mu)^2$$

The standard deviation is the square root of the variance divided by the mean.

$$standard\ deviation = \sqrt{\frac{\sum (X - \mu)^2}{n}}$$

However, the size of the standard deviation and the variance both depend on the size of the underlying values. This is important because both measures are not comparable across case studies if the data varies systematically between them. This is exactly the assumption here: AR systems are expected to have higher values than the CL systems do. To ensure that the distribution measure is comparable across case studies, it is more beneficial to rely on an indicator which is unaffected by the size of underlying values.

The Coefficient of Variation provides this neutrality. It is the standard deviation divided by the mean.

$$Coefficient\ of\ Variation\ (CV) = \frac{\sqrt{\frac{\sum (X - \mu)^2}{n}}}{\mu}$$

High CV scores indicate differences between the individual dimensions and the mean and therefore inconsistency in the overall approach. Lower values reflect consistency because the dimensions are closer to the average. They are all in the same position compared to the ideal types.

10.3.1 Evidence

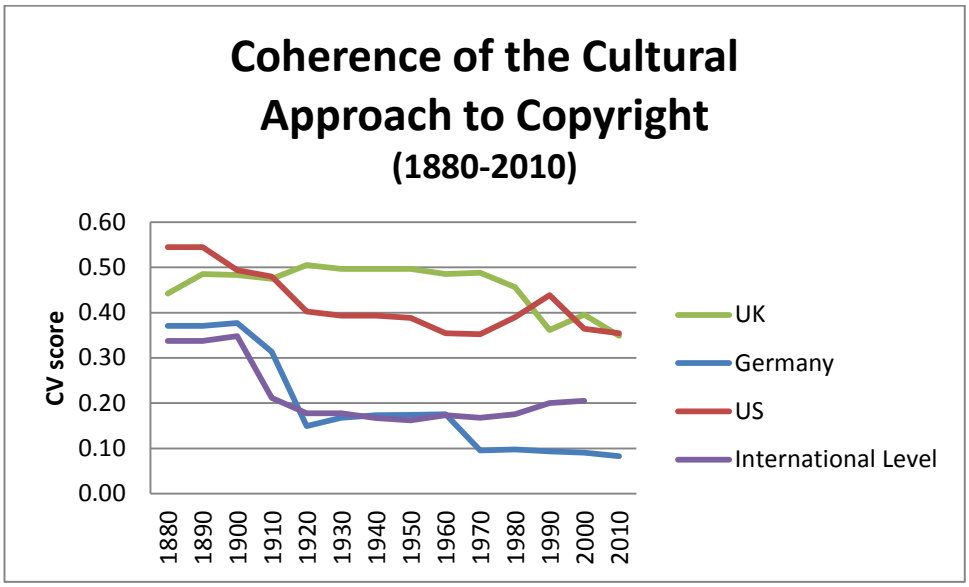

Figure 6: Coherence of copyright policies between 1880 and 2010.

It is clear from Figure 6 that all case studies have seen falling CV scores over time and therefore became increasingly coherent in their approach to copyright policy. Table 40 clarifies though that the actual level of coherence varies significantly across case studies. The UK saw increasing coherence as its CV score fell from 0.44 to 0.35 between 1880 and 2010. In the same timeframe, the US also became more consistent: from 0.54 to 0.35. Similarly, Germany's CV fell from 0.37 to 0.08. Finally, the International Level also saw an overall decline: from 0.34 in 1880 to 0.21 in 2010.

year	Germany	US	UK	International Level
1880	0.37	0.54	0.44	0.34[128]
2010	0.08	0.36	0.35	0.21

Table 40: Coefficient of Variation values for Germany, the UK, the US and the International Level in 1880 and 2010.

[128] This value is from 1890 because the International Level was not established yet in 1880.

10.3.2 Discussion

Three observations about the pattern stand out. First, it is noticeable that all national case studies were most consistent in 2010. Germany reached its most coherent state at a CV score of 0.08 in 2010. Although the CV for UK is at 0.35, it is more than four times as high. It is also its point of most coherence. Similarly, the US also had a CV of 0.35 in 2010-again the most coherent in the timeframe examined here (in combination with 1960-1970). In conclusion, 2010 was for all national case studies the most consistent point in time.

Secondly, the common law case studies UK and the US are significantly less consistent in their approach than Germany and even the International Level. The lowest CV scores for the UK and the US are the same as Germany's was in 1910 and the International Level in 1890/ 1900. This means that 140 years of increasing coherence has only brought them to the same level from which Germany and the International Level started in the first place. This is especially surprising because the International Level is a mix of different multilateral agreements. Inconsistency would have therefore been expected here. In sum, those case studies starting from an AR point have lower CV scores than the CL ones. However, the sample is too small though to be definitive in this respect: it could be a coincidence.

Thirdly, the age of the legislation does not have an identifiable impact on the coherence of the copyright system. Amendments have contributed to inconsistencies early in the timeframe, as has been amply identified for a long time in the UK (*Report of the Royal Commission* 1878). The same is not true anymore today. Germany has by far the lowest CV and therefore most coherent approach to copyright. However, its copyright act is also the oldest in 2010: 48 years. In fact, amendments have removed inconsistencies and not added them. Similarly, the US and the UK have identical coherence levels although the US act is 12 years older than the UK's. In conclusion, the age of the copyright act is not related to the consistency of the approach. Amendments instead can even increase coherence. They did not become hybrids but legal tradition is important. The copyright systems have become more systematic in their approach and understanding.

10.3.3 Conclusion

In conclusion, all case studies have seen a rise in inter-dimensional similarity, indicated by overall falling CV scores. Germany and the International Level especially have systematically lower CV scores than the UK and the US. This is especially surprising given that Germany's act is by far the oldest and the International Level is made up of a number of overlapping multilateral agreements making contradictions more likely. If these high incoherence levels are indicative of CL countries in general cannot be determined here because the number of case studies is too small.

The increases in the coherence of the approach mean that the individual case studies have brought their individual components of protection in line with each other when they reformed. Even when the overall cultural scores are oscillating and changing direction, the differences between the individual dimensions was still declining. This means that the reforms actually brought the individual components more into line than had been the case before. In this sense, the US and the UK have started to settle on a near neutral level approach to copyright. Although these have become hybrids in their overall position, this pattern reflects a systematic realignment of all provisions and therefore cultural change. They are therefore are hybrids by design, not accident. This contributes to the current of knowledge by highlighting that even though aspects from other copyright systems may have been adapted over time, this can result in change of the perception of copyright. Changes can be widespread than narrowly focused.

Germany on the other hand has moved continuously towards AR and seen falling CV scores along the way. Here, the evolution is not becoming a hybrid, but continuously changing its attitude to all components in a more AR manner. Most notably, even the falling convergence scores between 2000 and 2010 has not been accompanied by less coherence over time. Therefore, Germany has become more ideal type and more settled in this approach as well. It was a concerted reform rather than ad hoc. Therefore, changes in perception are not only possible if case studies become more hybrid but also when they move closer to an ideal-type vision.

Finally, the International Level is the only case study were recent reforms have been ad hoc in nature. Although its overall CV score also fell, they have been rising

again since 1970. Therefore, since neighbouring rights were introduced, the variation and differences across areas has increased. In addition, this has especially accelerated after 1990, emphasising that the 1990s's reforms made ad hoc changes and did not reflect one coherent vision. This is not surprising given that it has been repeatedly argued that the TRIPs agreement has been a fundamental change in approach (C. Correa 2007; D. Gervais 2008; A. Taubman et al. 2012). This shows that the adoption of new features does not necessarily fit the rest of the provisions well.

In sum, the main contribution of this section is that the US, UK and the International Level have become hybrids. However, not fully in the way that expected. It also shows that there should not be an assumption that changes in position are ad hoc. Although changes in the cultural position can be the result of narrow reforms intending to solve specific problems at the time, this is not always the case. Both moves to and way from the ideal types can be the result of changes in how copyright is understood. Even if the case studies oscillate in their overall cultural position, they can still be following one vision. Therefore, it is not possible to draw conclusions on how settled a copyright system is but just examining the changes in the overall cultural position. Instead, only the size of differences between the individual dimensions can provide this answer.

10.4 Conclusion

In conclusion, legal traditions have been of limited importance at the start of the timeframe. Nonetheless, the ideal types have still seen a decline in relevance for the US, the UK and the International Level. In all of these cases, the policies moved away from the respective ideal times between 1880/1890 and 2010. In addition, despite the overall changes of position and therefore the inclusion of features which are not linked to the traditional approach, the systems have increased in coherence. In sum, while the UK, US and International Level have become hybrids over time, changes were carried out evenly across dimensions.

At the same time though, Germany moved towards ideal type, although its approach in 1880 was neutral rather than a reflection of AR. The ideal type therefore

gained in importance. However, despite this trend, the coherence of the system increased. This means that Germany consciously moved towards AR and started to settle as an increasingly AR case study.

These findings have significant repercussions for the study of convergence because the basic assumptions underlying a sigma-style convergence could not be fully confirmed here. Although convergence is still possible, the continuous fluctuations in convergence scores make it unlikely that all case studies reacted in the same way at the same time. In addition, if the overall convergence pattern does not match, then the effect of causal factors does also deviate. As a result, both the convergence pattern and contributing forces need to be re-examined.

11. Convergence[129]

The previous chapter has focused on describing the case studies' relationship with their respective ideal types. The main emphasis was the on the assumptions underlying the cultural convergence hypothesis. Although not all of them could be fully confirmed, the deviations were not significant enough on their own to invalidate the argument that copyright has converged. As a result, the degree of convergence will be assessed in this chapter and the pattern will be compared to the driving forces commonly identified in the literature.

11.1 Cultural Convergence

The previous chapter has examined the basic assumptions underlying the convergence hypothesis. The importance of legal origin in 1880 was not as strong as presumed. However, more important were the findings that the case studies have not seen one shift away from their ideal types towards the neutral centre ground.[130] Therefore, some of the basic assumptions underlying the sigma-convergence consensus in the literature could not be proven here. Although this does not necessarily mean that there has not been any convergence, it is necessary to examine rather than assume this.

Analysing if convergence has actually occurred is important for a range of different reasons. First, the degree of convergence influences the possibility for future international consensus. It is argued in the literature that convergence is more likely if case studies share a similar culture. Essentially, they share an understanding of what copyright should do. Amending a policy imposes a cost which is generally lower if there is significant overlap between the existing policy and the proposed reform (D. Drezner 2007: 68- 71). In respect to copyright, this means that the more case studies have converged over time, the easier it will be for them to find consensus because the cost of implementation is less. In this respect, cultural convergence is also a good indicator for future action. Sharing an understanding of the purpose of copyright influences how challenges are perceived: the problem definition and the range of available solutions.

[129] This chapter has been accepted for publication by the journal *Script-ed* in abridged form.
[130] This has been established in 10.2 The Importance of Ideal Types over Time.

This in turn means that future issues, for example as a result of technological innovation, will be more likely met with similar responses.

Finally, the convergence pattern is also relevant for the role of causal forces. By identifying how and to what extent copyright policies have converged, it is possible to examine if the contributing forces identified in the literature have influenced the case studies as predicted. If these do not match the observable pattern, then other factors must have been relevant which are not adequately accounted for yet.

This section focuses on the same approach taken in the literature: identifying cultural convergence clubs. Convergence clubs are groups of case studies which move towards each other in their overall position (sigma-convergence). They have become more similar in their overall cultural stance. In turn, they exclude those case studies which have diverged instead. The clubs will be identified by using the overall distance between the case studies positions in 1880 and 2010. The discussion will then move to individual dimensions in an effort to identify the actual extent that policies have converged.

11.1.1 Evidence

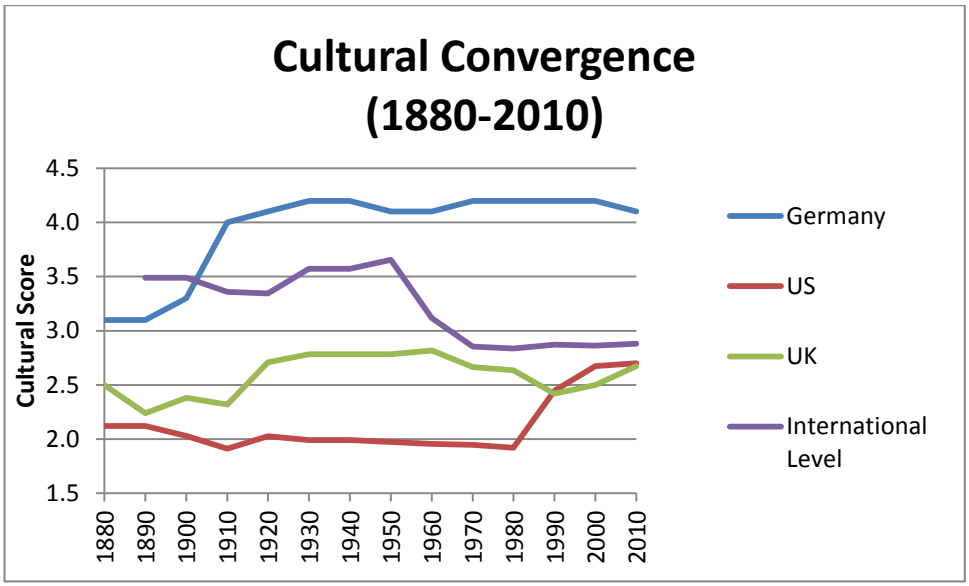

Figure 7: Convergence trends in copyright culture between 1880 and 2010.

Figure 7 makes it clear that there has been some convergence between 1880 and 2010. The US, the UK and the International Level have all moved closer to each other. In 1890, the US and the International Level were at a distance of 1.4. This declined to 0.2 in 2010. The UK also shifted towards to the International Level: the distance fell from 1.3 to 0.2. At the same time, the US and the UK became more similar as well: the differences declined from 0.4 to 0. This means that the UK and the US were closer to each other than the International Level in 1880. However, they are all very similar in 2010. Therefore, the US, the UK and the International Level form a convergence club.

Germany is not a member of this convergence club for the timeframe 1880 to 2010. Instead, the distances between the German copyright policy and the other three case studies have all increased over time. It rose from 1 to 1.4 in comparison to the US; 0.6 to 1.4 in relation to the UK and from 0.4 to 1.2 relative to the International Level. In addition, the size of the distances is noticeably large. In practice, the 2010 difference between Germany and the other case studies are all larger than the maximum distance in 1880 within the convergence club. In sum, Germany has not converged with the UK, the US or the International Level. Rather, it moved away from all of them.

To assess the degree of convergence, it is essential to look at the developments at the level of the individual dimensions. For example, it would be possible for the overall convergence score to become more similar over time while the trend for the majority of dimensions actually shows divergence. When the individual dimensions are compared between 1880 and 2010, the dominant trend is clearly falling differences. There have been convergences in seven dimensions between the UK and the US, eight between the US and the International Level and eight between the UK and the International Level. The US and the UK have three identical dimensions and the US with the International Level has four. At the same time, very few have seen a divergence: only three for the UK-US; three between the US and the International Level and two between the UK and the International Level.

When these findings are compared to the overall scores, it is clear that there is not a direct link between the number of converging dimensions and the overall degree

of convergence. The US and the International have seen the strongest shift towards each other. However, at the dimensions' level, it only has the second largest number of converging dimensions and actually the largest number of diverging ones. In addition, there are hardly any identical scores. Therefore, the number of areas which have converged, diverged or are identical are not good indicators. They reflect the overall convergence trends but not its extent.

The Coefficient of Variation (CV) can contribute to the discussion here because it provides a measure for inter-dimensional variation. As mentioned before, the CV indicates how far the individual values are away from the mean.[131] This is especially relevant here because the focus is on sigma-convergence. Sigma-convergence refers to a convergence pattern where all case studies are shifting towards each other rather than an external benchmark. By relying on the CV, it is therefore possible to assess the extent to which two or more case studies are way from the overall mean (=the mean of all case studies under consideration). In addition, the CV is independent of the size of the underlying values. Therefore, all values are directly comparable across case studies, irrespective of which case studies are included.

The UK, US and International Level have seen falling CV scores. The combined score for all three case studies has decreased from 0.53 to 0.31. This confirms the already identified convergence club. The same is true for the individual case study combinations. The CV between the US and the UK between 1880 and 2010 has fallen from 0.54 to 0.35. Similarly, the US has also moved closer in the individual dimensions to the International Level: from 0.52 to 0.29. The same applies to the UK and the International Level: the CV score fell from 0.49 to 0.28. Falling CV scores are not surprising given the overall convergence. However, they are significantly less extensive than the small distances in 2010 between the cultural positions would have suggested. The minimum distance between the case studies was 0 (UK and US) while the CV is still 0.35. This means that variation at the dimension level remains and needs to be examined.

[131] For a full account of how the CV works, please see 10.3 Coherence of the Copyright Systems.

It should be noted though that the case study combination with the smallest distance to each other does not have the lowest CV scores. In 1890, the US and the UK combined had a CV score of 0.57 and therefore nearly on par with the one between the US and the International Level in 1890 (0.52). However, the absolute difference to the UK was only 0.1 but 1.4 to the International Level. This means that although the absolute distance varies, the same CV score can be observable. The same can be observed in 2010. The largest overall distance in 2010 was between the International Level and the UK in 2010: 0.2. At the same time, the CV score was 0.28. However, the UK and the US were at 0 overall. Nonetheless, their CV score is 0.35 and therefore 25% higher.[132] This confirms that convergence has to be analysed not only at the final culture score but also the individual dimensions level. Final scores represent averages which can hide significant variation between individual dimensions. In conclusion, overall scores show convergence, especially between the US and the UK. However, the differences across dimensions indicate that actually the UK and International Level and not the US combined with the UK are the most similar.

11.1.2 Conclusion

In summary, the US, the UK and the International Level form a convergence club while Germany diverged from all of them. The overall distance, the number of converging dimensions and the overall fall in CV scores all indicate that the UK, the US and International Level have converged with each other. However, the overall distance in cultural score between them is deceptive. The UK and the International Level are the closest to a common mean and not the UK and the US. In addition, there remains significantly more variation at the dimensions' level than the maximum distance of 0 suggests. Similarly, hardly any dimensions have identical scores.

These findings mean that the overall convergence in final position actually masks the lack of convergence in individual dimensions. The continued variation also explains why technological challenges are not met with similar responses across

[132] One possible additional explanation here could be that the US and the UK individually already have comparatively high CV scores-raising them already for case study combinations. For a detailed discussion, see 10.3 Coherence of the Copyright Systems.

countries. Case studies occupy similar overall positions on the cultural spectrum and have become increasingly coherent in how they understand the role of copyright. However, the way they conceptualise the approach in individual dimensions continues to vary across case studies. As a result, the exact perception of what copyright policy should do continues to differ across case studies. This in turn means that when challenges (especially technological ones) require a copyright response, the interpretation of the problem and possible solutions varies. This is essentially what has been observable for the Google Books problem outlined in the introduction. However, it is not the only one.[133]

In terms of the literature, the evidence confirms those identifying important differences despite some convergence.[134] Although the overall positions have moved closer to each other and therefore the systems are more similar overall, the differences in the individual dimensions mean that significant cultural differences remain. This is especially important for the possibility of reaching consensus at the international level. If countries share one vision, the reaching consensus is more likely because the required change in position to accommodate proposed changes is smaller (D. Drezner 2007). However, given that the convergences here are not across all dimensions, the possibility for consensus is diminished. Actually, it could explain the difficulty in reaching agreement already experience in recent years.

Finally, the lack of cross-dimensional convergence is also important for assessing the contributing factors for convergence. Given that the convergences only affect the overall level rather than cover all dimensions equally, it is likely that converging forces also only affect individual dimensions. They are therefore narrow in scope. At the same time though, as the previous section has shown, the intra-case study coherences have increased. Therefore, those influences causing convergence have been incorporated into the copyright system in a way as to fit the other dimensions. In sum, while reform innovations fit the broader approach, the precise balances struck vary across countries. As a result, the copyright policies become more

[133] Kernfeld describes in detail how responses to other technological challenges, such as piano rolls (mechanical instruments) and home taping have also varied across countries (B. Kernfeld 2011).
[134] See for example: (F. Grosheide 1994: 204; H. MacQueen et al. 2008: 41; S. von Lewinski 2008: 63).

coherent while at the same time convergence is limited to comparatively few dimensions. In sum, driving forces are expected to cause overall convergence by influencing particular dimensions in such a way as to enhance the coherence of the overall approach. The following two sections will examine to what extent this is true.

11.2 Technology and Convergence

One of the convergence forces attributed with change is the role of technology. The case studies are similar in their developmental state and therefore have faced similar social and economic challenges (C. Knill 2005: 769; A. Lenschow et al. 2005: 807). Since the spread of technology does not stop at the border, its impact on culture can be one major explanatory force. In particular, economic pressures result into the inclusion of neighbouring rights and other particular technological innovations into the policies of the case studies (J. Drexl 1994: 103; P. Goldstein et al. 2010: 21).

In terms of technology, only the role of neighbouring rights is relevant. The methodology used to assess culture controls for rises in stringency and therefore incremental change.[135] This also means that it controls for incremental technological change: adding new work types, rights or sanctions is unlikely to make an impact by design.[136] In addition, only the distinction between copyright works and neighbouring rights is a distinguishing factor between AR and CL systems. Therefore, the analysis will be limited to the introduction of neighbouring rights as a category of rights.

The impact of technology is examined by focusing on how the introductions of technical works (neighbouring rights) have shaped the culture of the copyright systems. Strong neighbouring rights are an indicator for CL and therefore scores should be dropping when they are introduced. This in turn would make AR systems more hybrid and move CL systems towards their ideal type. The analysis also draws on secondary sources to contextualise particular data trends and therefore provide the necessary depth of qualitative information necessary to draw conclusions on causal forces.

[135] For a complete description, please see 7.3 The Classification of Variables.
[136] The impact of incremental technological change on stringency has been examined in 8.2.2. Technological Impact on Existing Works.

11.2.1 Evidence

In the UK, the introduction of neighbouring rights did not have an impact on the overall cultural stance. The 1956 Copyright Act introduced neighbouring rights as a distinct category, including broadcasts. The overall scores remained stable at 2.8. A look at the Protection of NR dimension reveals that although the UK is common law country, when it fully recognised neighbouring rights it moved away from its ideal type. The score in this dimension rises from 1 in 1950 to 1.3 1960. It is the scope of protection indicator which measures the comparative strength of provisions to copyright which has moved away from the ideal type (from 1 to 1.3). However, although neighbouring rights alone did benefit from the common law stance, other areas did. Overall, three areas saw rising scores[137] and another two falling ones.[138] In sum, the cultural impact is practically non-existent and the changes made are actually representative of more AR. The introduction did not lead to a reassessment in other areas following a more neighbouring rights friendly mind-set. As a result, reforms in these areas counteracted the influence of neighbouring rights.

The introduction of neighbouring rights did not impact on how Germany approached copyright policy. The cultural scores remained largely stable at 4.1 to 4.2 between 1960 and 1970. This can be explained by the limited importance Germany attributed to neighbouring rights compared to the traditional copyrighted works. The Protection of NR dimension is very AR in nature and with a score of 4.3. This is less than the ideal type score of 5 Germany had in 1960 when it denied neighbouring rights. Especially the scope of protection for neighbouring rights in comparison to copyright works to 4. At the same time, the 1965 reform was very extensive and changed the provisions in a large number of areas. Three dimensions saw rising scores[139] and only two, including neighbouring rights falling ones.[140] Therefore, the introduction of neighbouring rights was outweighed by changes in other areas. In conclusion, Germany's cultural approach was not affected by its introduction of neighbouring rights. This is explained by their very limited scope. This means that neighbouring

[137] Justifications (3.5-3.7); Emphasis of Protection (3.9-4.1) and Protection of NR (1-1.3).
[138] Scope of Protection (3.9-3.8) and Contract-ability (3-2.8).
[139] Act Structure (3-4); Justifications (3.4 to 3.7); Scope of Protection (3.4-4) and Contract-ability (3.5-4).
[140] Ownership: 5 to 4 and Protection of NR: 5 to 4.3.

rights had no cultural impact and, due to a historical anomaly, caused a fall in stringency.

The US 1976 reform also did not have a significant cultural impact. The score stayed at 1.9. This is especially surprising given the large scale reform and the strong neighbouring rights provisions it introduced. However, the Protection of NR dimension is very CL in nature. It shows a drop in score from 2.3 to 1.3. This can be explained by the ideal CL type ownership provisions and the strong neighbouring right sanctions: they both have a score of 1. Nonetheless, the actual scope of neighbouring rights protection is not entirely on par with copyright works. The score is therefore 2. Also, other dimensions have become more AR in nature. Four dimensions have seen rising cultural scores[141] and only one falling ones.[142] In summary, adding neighbouring rights strongly raised the stringency levels. However, the cultural impact is significantly less extensive.

The introduction of neighbouring rights triggered a significant cultural shift at the International Level. The score dropped from 3.7 in 1960 to 3.1 in 1970. This is caused by the Protection of NR dimension. It dropped from 4.3 to 2.3. The movement was shaped by the scope of protection indicator[143] which saw a fall from 5 to 3. This means that neighbouring rights are not actually on equal footing with copyrighted works. However, their importance as indicated by the relative protection provided to it has definitely improved. In addition, there have not been balancing changes in the other dimensions. As a result, the overall scores actually fell. In sum, neighbouring rights here have strongly affected the culture of the copyright system.

In conclusion, the difference between the expected result of falling cultural scores and the result has been the wider focus of the methodology used here. All case studies have seen a change in the dimension directly representative of neighbouring rights: the Protection of NR. However, there have not been accompanying changes in other areas. This is because the fundamental difference between AR and CL systems is

[141] Justifications (2.3-2.4); Emphasis of Protection (2.5-2.7); Scope of Protection (2.8-3) and Contract-ability (1.8-2).
[142] Protection of NR (2.3-1.3).
[143] This indicator shows the comparative strength of neighbouring rights compared to copyright works. For more detail, see 7.2.8 Protection of NR.

how they justify the protection and as a result the importance of the author as distinct from economic uses. Therefore, the importance of neighbouring rights is only one symptom of this broader underlying difference and not a cause in itself. As a result, the focus in the other dimensions is not on the distinction of neighbouring rights against copyright works but economic works and moral rights. It is this confusion and the resulting overemphasis of neighbouring rights as their own category of works in the convergence literature which explains the different results when a broad methodology incorporating all aspects of AR and CL systems is used. The main reason why there is variation is therefore the scope of analysis.

11.2.2 Conclusion

The findings from this chapter contradict the literature. The introduction of neighbouring rights and therefore works which are protected for their economic merits rather than authorial originality are linked in theory to the common law approach. Therefore, it would have been expected that at the common law countries in particular should have seen a shift towards their ideal types. Similarly, the absence of neighbouring rights protection is the author rights ideal types' approach. Therefore, once an AR country provides protection for neighbouring rights, their score should also fall.

However, the systematic impact in terms of culture is very limited. Only the International Level has seen a change in its cultural position as a result of introducing neighbouring rights. Germany, the UK and the US did not shift significantly. Although neighbouring rights protection by itself is a CL characteristic, the extent has varied significantly and was especially limited in Germany. In addition, the lack of change is caused by reforms in other areas. With the exception of the International Level, the introduction of neighbouring rights forms part of large scale reforms which affects all areas of protection. In these other areas, the preferences are titled towards AR. As a result, the overall change in cultural position is limited. In sum, the introduction of neighbouring rights does not cause cultural change because it does not change the approach taken in other dimensions. This shows that a narrow focus when determining

convergence, for example focusing on particular features and their spread, is not well suited to determining cultural change. It leaves out too many relevant considerations.

The lack of technological influence also means that the one general force identified in the copyright literature did not have a cultural impact. While technological innovation explains the rises of stringency very well, it has little explanatory power for culture. It therefore shaped the individual provisions but not the link between them. As a result, it is necessary to focus on the other causal forces for convergence identified as important in the literature: the role of individual actors. This will be the focus of the next section.

11.3 The Role of Actors

Influences are not necessarily general trends like technology. The literature points out that the international agreements, the US and the EU have all exercised pressure on other states to change amend their policies.

The first actor contributing to convergence is the impact of international copyright protection. On one hand, states do not legislate in isolation. For example, copyright debates from other countries were reprinted even early on (C. Seville 2006: 11), allowing ideas therefore spread across countries. Similarly, international organisations provide a forum in which these influences can be discussed (K. Holzinger et al. 2005: 790- 792). In addition, multilateral harmonisation has also been influential. This is based on one key assumption: its ability to bridge the gap. The philosophical differences between AR and CL have shaped international negotiations and as a result, international agreements represent a compromise between them (H. MacQueen et al. 2008: 43; S. von Lewinski 2008: 34). In this sense, strong multilateral agreements have led to an approximation of the systems (S. von Lewinski 2008: 63). The international dimension has therefore bridged the traditions, at least to some extent.

Another key actor which has contributed to convergence is the US. The US has an interest in other countries adopting its system (W. Kingston 2002: 333- 334). It is argued that it has exercised an important influence on both international and national copyright provisions. The US has spread its preferences by a mixture of example,

leadership, the use of its economic power, financial support to WIPO and technical expertise (W. Kingston 2002: 333- 334). The result was increased competition among the legal systems as the US sought to transplant CL features into the international level and therefore AR countries are required to bridge the gap (J. Braithwaite et al. 2000; S. von Lewinski 2008: 33- 34).

It is also argued that the EU has had a converging influence on the national laws of its member states-even to the point of making a true European copyright model possible. (P. Goldstein et al. 2010: 21) EU harmonization can lead to less convergence in practice than the legislation may indicate (L. Bently et al. 2009: 47). The actual level of harmonization is often less in practice because nationally sensitive issues are left untouched (L. Bently et al. 2004: 47; A. Littoz-Monnet 2006: 450).[144] The EU has been able to harmonize significant aspects of copyright law. However, some diversity remains, especially in the nationally sensitive areas. This section will now investigate these claims.

Identifying the influence of a case study on another requires a detailed examination of the differences between the two. If an actor has been influential, he will push for legislation which mirrors his own (W. Kingston 2002: 333- 334). The assumption is that his own policy will reflect what he perceives as the best approach to an issue. This pressure in turn would be identifiable in the data as convergence. If they move closer to each other, then the case studies are converging. If they are moving apart, then the trend is divergence. It should be noted that the literature does not explicitly refer to the dimension distinction used here but instead argues that the case studies have become more similar overall. This means that only those instances where the overall culture scores have moved closer to each are relevant here.

The assumption in the literature is overall convergence. Therefore, the first step has to be identifying those instances when the convergence scores moved owards each other. Table 41 shows the cultural values for all case studies including the EU.[145]

[144] Copyright exemptions have proven difficult to harmonize, see for example the (EU 2001).
[145] The EU was added here because it is attributed with a converging influence, especially on its member states.

year	Germany	US	UK	International Level	EU
1880	3.1	2.1	2.5		
1890	3.1	2.1	2.2	3.5	
1900	3.3	2.0	2.4	3.5	
1910	4.0	1.9	2.3	3.4	
1920	4.1	2.0	2.7	3.3	
1930	4.2	2.0	2.8	3.6	
1940	4.2	2.0	2.8	3.6	
1950	4.1	2.0	2.8	3.7	
1960	4.1	2.0	2.8	3.1	
1970	4.2	1.9	2.7	2.9	
1980	4.2	1.9	2.6	2.8	
1990	4.2	2.4	2.4	2.9	
2000	4.2	2.7	2.5	2.9	3.3
2010	4.1	2.7	2.7	2.9	3.5

Table 41: Cultural scores for Germany, the US, the UK, the International Level and the EU

From the table it is clear that there are the following instances of convergence:

- 1910-1920: UK and the International Level
- 1950-1960: US and the International Level
- 1980-1990: US and the International Level; US and Germany
- 1990-2000: US and the International Level
- 2000-2010: EU and UK; EU and Germany; US and Germany; UK and the International Level

A convergence pattern itself does not imply causality. Instead, it is necessary to identify the specific change causing the convergence and trace the amendment back to the particular actor in question. For example, copyright culture is understood here as 11 distinct dimensions. For each of these, the case studies can move closer or further away. Looking at these individual dimensions means that particular indicators can be isolated as the causes for convergences. By linking these indicators to the relevant secondary literature then allows establishing who has influenced whom and how this happened. In conclusion, to examine convergence, the overall scores are examined. However, to trace causality, the focus has to move to the specific indicators and

amendments which triggered it. This can only be done by using secondary literature to support the analysis.

Nonetheless, identifying what has driven a convergence is complicated by secondary effects. First, if an actor influences a case study, the resulting movement can have a secondary effect on other case studies. If case study A pushed for amendments which made case study B more AR in nature, then case study B would also move closer to all case studies already more AR than itself (for example case study C). As a result, there would be two sets of convergences observable: case studies A and B and B to C. It is therefore essential to examine each convergence individually because some are likely to be coincidental secondary effects.

Secondly, the methodology to assess culture is based on controlling for increases in stringency. This means that the classification of provisions is based on the percentage of the maximum value in the sample. If one case study changes its provisions strongly and with it the maximum in the sample, this can cause the relevant cultural indicator for other case studies to change as well.[146] For example, the maximum number of moral rights is 10 at time point t. If case study A has three moral rights, the resulting score will be a 2 (21-40% of the maximum value). However, if the maximum number falls to 5 moral rights, then providing for three rights is classified as 3 (41-60% of the maximum value). In sum, internal changes in a case study can have repercussions for other case studies because it affects an indicator's environment.

In sum, for each convergence period identified above, it is essential to trace who has shaped whom and how. The convergences have to be traced back to the individual dimensions and indicators to establish causality. The link between actor's preferences and reforms can be established by relying on secondary sources. As has been emphasised before, there is extensive literature on the details of reforms.[147] In addition, by taking such a detailed approach, secondary effects can be isolated and therefore those instances where reform is coincidental.

[146] For a detailed description of this methodology, please see 7. Copyright Culture.
[147] For an overview, please see 2. Literature Review.

This section will now discuss the influence of those actors emphasised in the literature: the International Level, the US and the EU. For reasons of clarity, the evidence will first be presented chronologically rather than by actor. This way, each instance of convergence is examined in detail. Afterwards, the conclusion will draw together the findings by actor and therefore identify the particular influence each of them had on other case studies.

The period under examination are those identified before:

- 1910-1920: UK and the International Level
- 1950-1960: US and the International Level
- 1980-1990: US and the International Level; US and Germany
- 1990-2000: US and the International Level
- 2000-2010: EU and UK; EU and Germany; US and Germany; UK and the International Level

11.3.1 Evidence

1910-1920: The International Level and the UK

The first major drop in distance is 1910-1920 between the UK and the International Level.[148] It fell from 1 to 0.6. Overall, the UK saw a shift towards AR as its score increased from 2.3 to 2.7. The International Level moved towards CL: the values fell from 3.4 to 3.3. The UK and the International Level therefore moved towards each other, although the shift was more pronounced for the UK.

Three individual dimensions saw a rise in similarity between the two case studies.[149] All of the amendments causing convergence occurred in the UK but only some can be linked to the International Level. The UK weakened the importance of its formalities by reducing their number and relevance. As a result, the indicators rose from 2 to 5 (Formalities) and 3 to 5 (Impact of Formalities) respectively. These amendments can be attributed to the Berne Convention. The major innovation in the Berne Convention was that it freed foreigners from additional formalities. Seville

[148] It should be noted that the Berne Convention was the only multilateral agreement in force at this point in time.
[149] Focus of Protection (2-1), Formalities (2,5-0) and Protection of Foreigners (2-0).

argues that by 1911, formalities were also seen as inappropriate for nationals, at least to the extent that they affected copyright (C. Seville 2006: 9).

In addition, there was also change in the Focus of Protection. [150] The 1920 reforms expanded the adaptation right to all work types. This in turn means that the Focus of Protection shifted from 1 to 2. This change however cannot be directly linked to the Berne Convention. The Berne Convention provided for the adaptation right for all relevant works in 1890 already, however, the UK only changed position in 1920. It should be noted though that the UK failed to systematically reform its provisions despite major efforts in this direction since 1878 (*Report of the Royal Commission* 1878; C. Seville 2006: 39). This could explain the delay. However, it not conclusive and has not been identified as a cause in the literature either. In sum, the International Level has had an influence on the UK's cultural evolution although it was not the only determining factor.

In conclusion, the International Level partially explains the cultural impact on the UK between 1910 and 1920. By changing the perception of formalities, the UK amended its legislation in such a way as to be closer to the Berne Convention. However, it is not the only determining influence.

1950-1960: The US and the International Level

The shift between 1950 and 1960 brought the US and the International Level closer as the distance fell from 1.7 to 1.2. Only the International Level changed overall position: from 3.7 to 3.1. The US remained stable at 2. Overall, the distance between the two case studies fell because six individual dimensions moved closer to each other.[151] These were shifted by three developments. Most importantly, the UCC brought a change in formalities to the international level. Both their number and their impact increased significantly. The relevant scores dropped from 5 to 4 (Number of Formalities) and 5 to 1 (Impact of Formalities) respectively. The rising importance of

[150] The Focus of Protection describes what is actually protected, ranging from the physical copy (score 1) to the author's personality (score 5).
[151] Justifications (1.5-1.2), Focus of Protection (2-1), Emphasis of Protection (1-0.9), Scope of Protection 0.6-0.2), Formalities (4-1.5), Protection of Foreigners (3-0.6).

formalities also means that the indicator for the scope of protection for foreigners fell from 3 to 2.[152] Overall, these amendments affect five of the six dimensions in question. The change to formalities can be attributed to the influence of the US. As has been highlighted before, the US strongly supported the UCC and opposed the lack of formalities in the Berne Convention and put pressure on the level of originality (P. Goldstein 2001: 28) which in turn shifted the Focus of Protection from 4 to 3.[153]

The US influence does not explain the whole change. First, it should also be noted that membership in a multilateral agreement has had an effect on the US although a very limited one. The cultural score for the scope of protection for foreigners rose from 2 to 3 in the US.[154] The impact however is not strong enough to affect the overall cultural position of the US. Secondly, there were two developments which were external to the International Level and the US. In 1956, the UK raised the number of protected work types and lowered its available sanctions. Both of these changes impacted on the indicators' environments. As a result, the International Level's classifications dropped for Work Types (from 4 to 3) and for Economic Work Sanctions they increased (2 to 3). Part of the impact was therefore the changing overall indicator environment. In sum, the International Level has only exercised a very small impact in return, limited to the scope of protection for foreigners. This was supported by UK reforms with indicator-wide implications.

In conclusion, the US influenced the UCC but it was not the only influence. The US had a significant impact on the design of formalities and their impact and originality at the international level because it actively shaped the UCC. This in turn had repercussions on the Protection of Foreigners as well. Nonetheless, external changes, especially the UK amending the provisions for Work Types and Sanctions also played a role. These triggered a reclassification which cannot be attributed to the US.

[152] It moved from 'some formalities' (=publication location requirement) to 'extensive formalities' because now additional requirements in the form of the © apply in addition to the location of publication rules.

[153] This is even if the originality indicator as such is not shifting. For the analysis if the originality level is considered to have dropped, see Appendix 2.

[154] It moved from 'limited protection with extensive formalities' to 'reciprocity with some formalities'. Overall, foreigners benefit from the member in multilateral agreements.

1980-1990: The International Level and the US

The International Level, in particular the Berne Convention also influenced the US between 1980 and 1990. At this time, the US increased its cultural score from 1.9 to 2.4 while the International Level experienced a minor shift from 2.8 to 2.9. Only two areas show convergence: Justifications and the Emphasis of Protection. These shifts can both be attributed to the International Level. Membership in the Berne Convention forced the US to amend its approach to formalities and moral rights (G. Davies 1995: 4; G. Davies 2002: 336). As a result, it changed the number of formalities and their impact indicators from 1 to 3 and 1 to 5 respectively. It also introduced explicit moral rights protection. This in turn shifted the relevant indicators to AR as well: the cultural values for number of moral rights and for the term rose from 1 to 2. However, the US also provided for a large number of exemptions affecting them: the indicator fell from 5 to 1. In conclusion, joining the Berne Convention required the US to amend its approach to formalities and moral rights. These changes triggered a convergence.

In conclusion, the International Level has caused a cultural shift convergence. The changes to formalities and moral rights changed the cultural position of the US via their impact on Justifications and the Emphasis of Protection.

Secondary Effect

In addition to these direct influences, the influence of the International Level had some secondary effects. The US shift caused by the Berne Convention also explains its convergence with Germany. Overall, the difference between the US and Germany fell from 2.3 to 1.9 because the US has moved closer to AR (1.9 to 2.4) while Germany remained stable (at 4.2). Of the five dimensions which have seen falling distances[155], three are entirely caused by the US' changes to formalities and moral rights. The differences fell from 0.9 to 0.3 (Scope of Protection); 4 to 1 (Formalities) and 2.6 to 0.6 (Foreigners).The US had introduced a large number of exemptions when

[155] These are: Justifications (1.3-1), Emphasis of Protection (1.2-1), Scope of Protection (0.9-0.3), Formalities (4-1) and the Protection of Foreigners (2.6 – 0.6).

it introduced moral rights. This changed the overall environment in this area.[156] The result is a reclassification for Germany's number of moral rights exemptions indicator: from 1 to 2. This one change explains Germany's movement in the Emphasis of Protection and Justifications. In conclusion, the US has not influenced Germany into a convergence by making it amend its policies. Rather, the US' own changes affected the indicator environment for moral rights exemptions which in turn triggered a reclassification for the German value (from 1 to 2). In sum, while the US has moved because of the International Level, it also moved towards Germany. The US-Germany convergence is incidental and not the result of the case studies actively shaping each other.

Like with Germany, the US shift also explains the growing similarity to the UK. The distance between the US and the UK fell from 0.7 in 1980 to 0 in 1990. The US moved upwards from 1.9 to 2.4 while the UK moved downward: from 2.6 to 2.4. Overall, five dimensions have converged in this decade.[157] The first major influence for change was the US changes to its formalities and moral rights provisions. As discussed before, these amendments were caused by the International Level and not the UK.

However, the convergence was also caused by internal developments in the UK. First, the UK had a major reform in 1988 (CDPA). Adding a large number of exemptions is common at these large scale reforms.[158] In addition, it also amended existing provision to account for more general developments. The impact of formalities also moved (from 5 to 4). In addition, the CDPA amended moral rights. These changes cannot be attributed to the US. First, the timing is practically identical. The CDPA was in 1988, the same year the US joined the Berne Convention. Secondly, the US changes are caused by the Berne Convention which the UK had been a compliant member of for over 100 years at this time. In conclusion, the convergence between the UK and the US is an indirect result of the International Level's influence as well as internal UK reform. It is not caused by US influence on the UK.

[156] The US changed the maximum value in the sample. As a result, the 20%, 40%, 60%, 80% boundaries shifted. For a more detailed explanation, see 7.3 The Classification of Variables .
[157] Justification (1-0), Emphasis of Protection (0.9-0.4), Scope of Protection (0.7-0.4), Formalities (3.5-0.5), Protection of Foreigners (2.3-0.4).
[158] For a detailed discussion of how major reforms link to stringency, see 8. Stringency Evolution, especially 8.11.Evidence and 8.2 Causes for Change.

In summary, the International Level triggered a rise in the US' cultural scores. This was mainly the result of the formalities and moral rights provisions. However, as the cultural scores increased, the distance to those case studies which already had higher scores also fell, namely the UK and Germany. The cultural similarity can be explained by the effect the International Level had on the US in combination with domestic reform in Germany and the UK. However, these reforms cannot be linked to the influence of any particular actor on the others and are therefore coincidental rather than the result of targeted action as is examined here.

1990-2000: The US and the International Level

The US converged with the International between 1990 and 2000. The US moved from 2.4 to 2.7 while the International Level remained stable at 2.9. The distance between them therefore fell from 0.4 to 0.2. Four dimensions account for this convergence.[159] First of all, it is noticeable that the Originality and Focus of Protection convergences are caused only by the US and here the real cause is internal. The 1992 *Feist* case raised the level of originality (Feist Publications, Inc. v Rural Telephone Service Company, Inc. 1991).[160] This cannot be attributed to the International Level because originality was not a topic in either TRIPs or the WIPO agreements.

Similarly, the Scope of Protection was also largely shaped by domestic US developments. The copyright term and exemptions with remuneration indicators are US internal and therefore not International Level dependent. However, the sanctions available for Economic Works changed significantly at both the US and the International Level. The score increased in the US from 4 to 5 and 2 to 5 for the International Level. This stance is confirmed if one considers the Protection of NR which has also converged. Here the International Level reduced the scope indicator from 3 to 2 and brings it to the same level as the US. It expanded the term of

[159] Originality (2-0), Focus of Protection (1-0), Scope of Protection (0.4-0.2) and the Protection of NR (1-0.7).

[160] Some authors argue that the case has not changed the originality requirements. For an analysis assuming that it had no importance, see Appendix 2.

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protection for neighbouring rights[161] to the same level as copyright works although the number of rights remained less than those available for copyrighted works.

Given that the International Level shifted more extensively and the importance attributed to the US in the 1990s agreements, it is most likely that the International Level converged with the US and not vice versa. The US played a major role in shifting the forum away from WIPO towards the WTO (J. Braithwaite et al. 2000: 64; P. Goldstein 2001: 52-53). Both of these agreements have strong provisions for neighbouring rights and enforcement and therefore the main interest of copyright owners in the US (J. Braithwaite et al. 2000; P. Goldstein 2001: 59). This is despite the official implementation in 1998 (US Digital Millennium Act) was four years after TRIPs and two years after the WIPO Treaties. In conclusion, the 1990 to 2000 convergence between the US was caused by internal considerations in the US and the US shaping the International Level. This indication is confirmed by the stringency developments.

In conclusion, the US actively shaped the International level although this only explains part of the convergence trend. Most of the rising similarity in culture was caused by internal US developments in the form of the *Feist* case and its impact on originality. Changes to the Protection of NR and the Scope of Protection can be linked to the US though.

[161] For phonograms and performers only via the WPPT.

2000-2010: The Influence of the EU

EU and UK

The EU had an effect on the UK between 2000 and 2010 although it did not cause convergence but a case of parallel movement.[162] The UK moved from 2.5 to 2.7 while the EU shifted from 3.3 to 3.5. They are therefore both moving towards AR. The difference between them remained stable as a result. Changes here between the two case studies are limited to Originality and the Focus of Protection. Essentially, the UK shifted from 1 to 2 for Originality. As a result, its score in both dimensions also increased. This means that the distances in these two compared to the EU fell from 2 to 1. This change in the UK has been clearly attributed with the EU before (G. Davies 2002: 345- 346).

However, it should be noted that other areas have seen divergences. The most change here was in the area of Contract-ability. The distance increased from 0.1 to 1.3. The causes for this are mixed. On one hand, the EU shaped the UK's moral rights provision by requiring a resale right. Therefore, the EU is the cause that the number of moral rights indicator increased from 3 to 4. On the other hand, most of the impact was internal to particular case studies. First, the UK changed its contract provisions (3 to 1). At the same time, the EU had changed the number of exemptions with remuneration provisions. The indicator rose from 1 to 5.[163] Finally, Germany had changed the term of its moral rights[164] which pushed the UK indicator in this field from 4 to 5. In conclusion, the EU's influence on the UK has not triggered an overall convergence but contributed to a parallel movement of the two case studies closer to AR. Other relevant factors include domestic reforms in Germany, the UK and the EU.

In conclusion, the EU's influence explains parallel movement with the UK to some extent. In response to the EU, the UK raised its originality level. However, the

[162] Although this is not strictly speaking a case of sigma-convergence, it has been argued by Seeliger that it is a noticeable development (R. Seeliger 1996). Therefore, it will be included in the analysis here, especially since the cause for the parallel movement is linked to a direct influence.
[163] This is a result of it establishing these rights in the first place rather than amending existing ones.
[164] In the *Kinski* case (kinski-klaus.de 2006), it was decided that the economic dimension of moral rights was only active for 10 years after the authors death. Therefore, the minimum term for moral rights fell from 70 years after death (=105 years) to 10 years after death (= 45 years).

impact is narrow in scope. Strong divergences triggered by internal developments not only within the EU and the UK but also Germany account for this.

EU and Germany

Germany and the EU have converged between 2000 and 2010. The distance fell from 0.9 to 0.6. Germany shifted from 4.2 to 4.1 while the EU shifted from 3.3 to 3.5. The distance between the two case studies has fallen in four areas.[165] The EU did not really influence Germany though. Germany had re-shaped its exemptions, especially those with remuneration conditions.[166] It also changed the term for moral rights. However, only the permission for temporary reproduction can be directly linked to the EU (Germany 1965: §44a; EU 2001: art 5 1)). This is only one out of nine new exemptions. The impact should therefore not be overrated. In addition, the EU's approach to exemption has been attributed with little impact in relation to member states (L. Bently et al. 2009: 47; B. Lindner et al. 2011: 41). It can therefore not be established that the EU shaped the number of conditions applicable. Furthermore, the reduction in the moral rights term is also not caused by the EU but by the recognition that moral rights have a distinct economic dimension (kinski-klaus.de 2006).

Similarly, there is not a clear indication that Germany has shaped the EU's approach. The EU's shift between 2000 and 2010 is the result of it adding new provisions, especially exemptions. As a result, its exemptions for Economic Works changed from 4 to 3 and those with remuneration requirements from 1 to 5. None of these changes can be linked directly to Germany. It has been emphasised before that the EU exemption provisions are a list of exemptions available anywhere in the EU (B. Lindner et al. 2011: 41).

In conclusion, the EU and Germany have converged. This is the result of the EU putting Germany's originality requirements under pressure. In addition, internal amendments within the EU and Germany which are not linked to the other case study

[165] Justification (1.1-0.6), Emphasis of Protection (0.7-0.4), Scope of Protection (1-0.3), Contract-ability (1.7-0.7).

[166] The changes are: number of exemptions for Economic Works (2 to 1); Conditions affecting Economic Work exemptions (4 –5) and number of exemptions with a remuneration conditions (stable at 5).

also account for some of the cultural change. These however are the only causes of the stringency convergence. Therefore, EU has had some influence but this is not the sole determinant for cultural convergence.

Secondary Impact

The changes between 2000 and 2010 also developed a secondary impact. In particular, the UK moved closer to the International Level and Germany to the US. However, these are entirely coincidental and need to be considered secondary effects rather than the result of the influence of individual actor's on each other.

UK-International Level

The UK and the International Level have also converged between 1990 and 2010. It is the result of the UK moving towards AR (from 2.4 to 2.7) while the International Level remained stable 2.9. The distance between the two case studies fell accordingly from 0.5 to 0.2. However, a closer look shows that the UK's developments cannot be attributed to the International Level. Five dimensions have seen a fall in the distance between the case studies.[167] Between 2000 and 2010, the UK raised its originality level. This raised the scores in the Originality and Focus of Protection dimensions. However, this cannot be linked to the International Level because no change requiring this has occurred there. Instead, it is the result of the EU.

In this vein, the International Level's shift for moral rights term is not the result of its action, but events in Germany.[168] Finally, the International Level lowered its Protection of NR by reducing the comparable scope to CR works[169] and moves away from the UK by doing so. This in turn is an effect of the US on the International Level.[170] Finally, the UK acted independently the number of exemptions for Economic Works, the conditions which apply to exemptions, moral rights and the rising number

[167] These are: Justifications (0.4-0.2); Originality (2-1), Focus of Protection (1-0); Emphasis of Protection (0.1-0) and Protection of NR (0.3-0).
[168] Germany significantly lowered its available term by restricting the economic dimension of moral rights to 10 years after the death of the author. (kinski-klaus.de 2006).
[169] Indicator: Scope for neighbouring rights protection.
[170] See 1990- 2000: The US and the International Level.

of exemptions affecting these (all of which explain the change in the Justifications dimension). None of these provisions have been subject to regulation at the international level after 1990 or have been shaped by any other actor. In conclusion, the UK and the International Level both move towards AR between 1990 and 2010. However, they are affected by some third party trend because they do not shape each other.

In conclusion, the UK and the International Level converged between 2000 and 2010 in terms of culture. However, this was not caused by the case studies influencing each other. Instead, it was the combination of independent domestic reforms, secondary impacts by Germany and the EU as well as US influence.

US-Germany

The convergence between the US and Germany (2000-2010) can also be partially attributed to the EU. Germany moved from 4.2 to 4.1 while the US remained stable at 2.7. The difference fell accordingly from 1.5 to 1.4.The convergence was the result of four individual dimensions[171] moving closer to each other. Germany raised its number of exemptions, the conditions which apply to them and strongly reduced the minimum term for moral rights. The US also changed its conditions for exemptions; however the changes to its moral right term are repercussions from Germany's amendments rather than its own action. These few changes however explain the change in three converging dimensions. In addition, Germany was under pressure with its originality requirement due to the EU (G. Davies 2002: 345- 346). This in turn shifted the Focus of Protection from 5 to 4.[172] Therefore, it was not the US which made Germany shift between 2000 and 2010 but the EU. While Germany had some minor impact because it lowered its term of moral so significantly, the impact was secondary and not direct. In conclusion, the US did not trigger amendments in Germany or vice versa.

[171] Justifications (1.3 to 0.9), Focus of Protection (2-1), Emphasis of Protection (1-0.6), Scope of Protection (0.7-0.5).

[172] For the analysis where the impact is considered more extensive, see Appendix 2.

In conclusion, Germany and the US did converge in terms of culture. However, the growing similarity in culture is not the result of either one influencing the other case study. Rather, it the incidental result of a mixture of internal reforms and EU pressure in Germany. The lack of direct influence in turn already explains why the stringency provisions have not converged.

11.3.2 Discussion

The empirical evidence was presented chronologically, identifying instances of convergence. As a result, a number of observations can be made about the influence of particular actors. These will now be discussed in turn.

International Level

The International Level has shaped other case studies at two distinct moments. First, it moved the UK closer to AR between 1910 and 1920. However, these changes did not cause a convergence in stringency as well, mainly because the UK started to protect sound recordings. In addition, the International Level also raised the cultural scores in the US between 1980 and 1990. Again, it did not cause a stringency convergence.

A few common observations can be made. First, both case studies were influenced by the same multilateral agreement: the Berne Convention. Depending on how one judges the Berne Convention, this is not surprising. On one hand, it is the most stringent multilateral agreement examined here. Therefore, if any multilateral agreement was likely to require amendments, it is the Berne Convention. On the other hand, it still only sets minimum standards and neglects core areas of copyright policies, especially enforcement. Both the US and the UK had already established comparatively comprehensive copyright systems. They were therefore unlikely to be affected by minimum standards.

Secondly, the influence of the Berne Convention has caused a shift towards AR in both the US and the UK. This is closely linked to the changes it actually required: the abolition of formalities. The extent of the Berne Convention's influence varies though.

The Berne Convention does only affect the works of foreigners. Because the US had numerous constitutive formalities, the distance to the Berne requirements made it necessary to actually amend its policy. The UK had always complied with the no formalities rules for foreigners since 1890 and therefore from the beginning. However, it still had a change of attitude which invalidated them as a whole. This is reflected in the 1911 Copyright Act (C. Seville 2006: 9). In both countries, it was not perceived as viable to have more restrictive provisions for your own nationals compared to Foreigners. As a result, the US and the UK abolished the constitutive and enforcement relevant formalities.

It should be noted that the Berne Convention also required changes to the moral rights. However, here the moral impact has been significantly smaller. The large number of exemptions the US in particular is indicative of only partially accepting the concept as such.[173] This therefore shows how the Berne Convention exerted both a moral and a direct influence on policy.

Finally, while the Berne Convention has shaped culture, its direct influence has not caused a stringency convergence. However, the changes made to the US in particular did account at least partially for its stringency convergences with the UK and the Germany which it triggered indirectly. This means that while the required changes are too narrow for direct stringency convergence, it is possible in favourable circumstances. The UK's domestic reforms and the US impact on the moral rights exemptions indicator environment have provided these. In conclusion, the International Level only contributes but does not determine the growing similarity in terms of stringency.

In summary, it is clear that the International Level, in the shape of the Berne Convention, has had a converging influence over time. However, the actual impact is limited to formalities and significantly less so moral rights. Therefore, its major effect is constrained to the one area it is most precise about: no additional formalities for foreigners.

[173] The comparative stringency level fell.

The US

The US has influenced other case studies but within this sample, the effect is limited to the International Level. The US influenced the design of multilateral agreements at two distinct points in time. First, it ensured that the UCC would permit constitutive formalities. This was the one main point of disagreement with the Berne Convention. However, by joining a multilateral agreement, even one that follows its preferences, it still developed an impact in terms of available protection for foreigners. Therefore, the US strongly influenced the UCC both in cultural and stringency terms. However, it was also influenced in return although less extensively.

The second instance of US influence on the International Level was the 1990s TRIPs and WIPO treaties. Here, the US ensured stronger comparative protection for neighbouring rights and stronger enforcement provisions. This has been well-documented before and is not surprising. Corporate copyright owners in the US targeted these areas specifically. The result was growing similarity in terms of culture and stringency. However, the convergence is also the result of independent US action which is not related to the international activity at all. It is therefore US internal and external action which caused this convergence.

In conclusion, the US has only influenced the International Level and exactly at those junctions already identified in the literature. The actual impact though was limited early on to the formalities. It later extended to enforcement and neighbouring rights.

The EU

The EU has influenced other case studies but this is limited to its member states. In particular it has put the understanding of how original a work needs to be under pressure in both Germany and the UK. The impact of this varies. The EU and the UK did not actually converge but move in parallel towards AR. In essence, the changes were two narrow to actually trigger an overall convergence.

The second major observation has to be the limited impact on stringency levels. There has not been any stringency convergence here between the EU and another case study. Rather, changes were the result of significant domestic reforms in Germany, the UK and the EU. Finally, it is also not possible to identify member state influences on the EU, neither for culture not stringency.

11.3.3 Conclusion

While technology does not explain cultural shifts well, the cross-national influences provide more insights. Three actors were highlighted as influential in the literature: the International Level, the US and the EU. Their role has been analysed here by relying on both the data, supported by a detailed analysis of secondary literature. The degree that they have shaped other case studies has varied though both in extent and the timing.

The clearest impact on culture can be attributed to the International Level, especially the Berne Convention. It had an influence on the US which abolished constitutive formalities and introduced explicit moral rights provisions. These changes are the result of both the International Level's legal and moral pressures. Similarly, the UK also abolished all effects of formalities on copyright policy. These were not triggered by a need to comply but reflected the long-term change in attitudes which was strengthened by the Berne Convention. Unsurprisingly, the impact of the Berne Convention on both case studies is consistently in the direction of AR.

The impact of the US on culture is also clear but limited to International Level. It has actively shaped both the UCC and the 1990s TRIPs and WIPO agreements. Changes here strongly reflect US preferences. The 1951 UCC allowed for compulsory

formalities ad therefore accommodated the point of main contention with the Berne Convention. After 1990, the focus shifted to neighbouring rights and most importantly copyright enforcement at the international level. These US preferences feature strongly in the treaties concluded in 1994 TRIPs agreement and 1996 WCT/ WPPT.

The EU also had some direct cultural impact although it is limited to its member states. The main effect was on the areas of moral rights and originality. However, the impact was very narrow in scope. This explains why some cultural dimensions continuously diverge, especially between the UK and the EU and also why Germany did not overall converge with the EU despite the impact it had on its originality level.

Convergences are often caused by independent internal reforms rather than the particular amendments favoured by other case studies. In essence, only the growing similarity between the US and the International Level (1950-1960) has not been supported by favourable domestic reforms. This means that although case studies directly influence each other, they are seldom the only cause. Rather, the changes are accompanied by other reforms which are not caused by the other case study. However, as it stands, the shape of particular reforms cannot be explained by the theories emphasised in the literature.

In sum, the influence of particular actors does not explain all changes. As the discussion has also amply demonstrated, case studies experiences shifts as a result of major internal reforms and seminal court cases. These cannot be linked to any external influence but have arisen from within.

		Affected Area		Primary Impact			Secondary Impact				
Interval	**Convergence between**	**Culture**	**Stringency**	**International Level**	**US**	**EU**	**International Level**	**US**	**EU**	**Germany**	**UK**
1910-1920	International Level-UK	X		X							
1950-1960	US-International Level	X	X	X	X						X
	International Level-UK	X						X			
1980-1990	International Level-US	X		X							
	US-Germany	X	X				X	X			
	US-UK	X	X				X	X			
1990-2000	US-International Level	X	X		X						
	US-Germany	X							X		
2000-2010	EU-UK	X				X				X	
	EU-Germany	X				X					
	UK-International Level	X	X					X	X	X	
	US-Germany	X							X		

Table 42: Summary of the impact of individual actors on other case studies.

11.4 Conclusion

In conclusion, the empirical evidence has only partially confirmed the current consensus. Although the UK, the US and the International Level have converged in their overall scores, the individual dimensions do continue to differ significantly. This is especially undermining the consensus given that they have settled in their approaches at the same time: the coherence of the systems has increased as convergence continued. Furthermore, Germany, the system with the least inter-dimensional variation, has actually diverged between 1880 and 2010. Given this pattern, it is not surprising that copyright responses to challenges have varied significantly in the past and still do. It also explains why international consensus has proven so elusive.

In line with the gaps in the pattern, the driving forces identified by the literature can only be considered partial explanations at best. On the basis of the data in conjunction with an extensive analysis of secondary sources to support and contextualise it, a number of conclusions have been drawn. First of all, the introduction of neighbouring rights and therefore the main cultural impact that technology has developed over time, had little impact on the culture of the case studies examined here (with the exception of the International Level). The influence of individual actors has more explanatory power but is not the only contributing force. Essentially, there is a major gap in the explanation: the specific shape that national reforms take. Although particular features spread over time and this can be linked to the preferences of other actors, much of the change cannot.

It is especially notable that the area of exemptions is practically independent of actor influences. Given that both the stringency and cultural developments lack an explanation for the development of exemptions, it seems to be most fruitful to focus on them in future study. One avenue of further study in this respect could be to take a more general approach by drawing on the literature in political science, for example such theories as regulatory competition to answer the question. It is a reflection of the political and economic pressures already identified in the stringency analysis but adds the role of economic discourse. For example, it may be possible that exemptions

reflect a need to accommodate innovation potential.[174] It is of key importance to add cross-national theories which focus more on the domestic dimension to the discussion.

The main problem with the weakness of explanation is that it limits the predictability of the future. At this stage, it is not clear what has caused a significant part of the convergence up to this point. Without an adequate explanation for why copyright systems have converged up to this point, the future evolution remains unclear. It is impossible to make predictions for the future. It is especially difficult to predict how the external forces already identified will interact with the under-theorised domestic dimension.

[174] Exemptions are key for innovation (R. Anderson 1998: 660).

Part 4: Conclusion

This thesis set out to examine the evolution of copyright policy by distinguishing between the overall approach to copyright in terms of culture and the strength of protection defined as stringency. It provided a tool kit to move from qualitative data to quantitative one in both areas in an effort to generate directly comparable evidence. The evidence was then used to examine 11 distinct assumptions and arguments about the development of copyright policies, ranging from their evolution to causal forces (Table 1). While the identification of trends relied largely on the data, causal forces were identified by using the data in combination with secondary literature.

The evidence shows that the stringency levels have strongly risen in all case studies without becoming more similar over time. As was expected, these increases can be to a large extent be attributed to new technologies and their inclusion in copyright over time. Digital technology has accelerated the process, especially in the US and at the International Level.

However, the development of exemptions is not adequately theorised at this stage. This had a number of impacts. First and contrary to the literature, the stringency levels have not been rising continuously. Instead, the rising number of exemptions has caused the scope of protection to fall in all case studies at some point of time. In addition, these exemptions also account for the stable balance between copyright owners and users. Digital works are subject to more limited exemptions and therefore unusually stringent provisions. Nonetheless, none of the three kinds of works (copyright works, neighbouring rights or performers) as such have seen a change in the balance towards the copyright owners. It is clear though that authors have lost out compared to corporate owners. Therefore, arguments on the undue gain of right holders compared to users are not corroborated by the evidence, though authors are definitely at a disadvantage. As a result, arguments against an expansion of copyright are weakened unless the basis for resistance is the exploitation of authors.

	Proposition	Conclusion
1	Stringency levels have increased over time.	The level of overall stringency has risen between 1880 and 2010. However, there have been significant instances of falling stringency levels, too.
2	Technological innovation has caused the rising levels of stringency.	Most of the rise in stringency levels has been a response to the development of new technologies and how these were incorporated into copyright policies. Digital works are affected by the most stringent provisions.
3	The effect of stringency on the individual case study has been particular pronounced in the digital age.	The digital age has developed an effect, mainly in the area of exemptions.
4	Corporations have over-proportionally benefited from rising stringency levels in comparison to users.	Corporations have not benefitted more from copyright reforms than users.
5	Corporations have over-proportionally benefited from rising stringency levels in comparison to authors.	Corporations and not authors have benefited from copyright reforms.
6	Copyright systems have converged over time.	The copyright policies of the UK, the US and the International Level have become more similar over time although the extent is limited. Germany has not converged.
7	Older copyright policies will show the strongest link to the traditional cultural approach.	Legal traditions have some but only a very limited relevance early on in the timeframe.
8	Copyright policies have moved away from their respective ideal types over time.	Copyright policies in the US, the UK and at the International Level have become hybrids over time but Germany has not.
9	Copyright policies have become increasingly settled over time in how they perceive the purpose of copyright time.	Copyright policies have become more coherent over time and therefore across the different policy areas.
10	The cultural convergence of copyright has been caused by technological innovation.	Technological innovation has not contributed to the convergence of copyright policies.
11	The cultural convergence of copyright has been caused by individual actors.	The influence of an actor on another explains some of the cultural convergence.

Table 1: List of propositions that have been made in the literature and the conclusions drawn on the basis of the empirical evidence.

These findings have a profound impact on the how the scope of protection needs to be understood. First, it is not sufficient to focus on the rights of copyright owners/ authors. Instead, any change in the law has to be directly compared to how the scope of exemptions has developed. Only looking at both of these components together and attributing them with equal importance provides an accurate image of the scope of protection over time.

Another insight is that the debate should not just focus on the user- copyright owner debate. More attention needs to be paid to the gain that corporations make in comparison to the authors and the users; and if these developments are in line with the stated aims of copyright policy. The data has clearly shown that corporations have gained more than authors. But the Internet gives a growing number of authors the ability to create, disseminate and benefit from their works directly and maintain direct control over their works. This in turn shrinks the need/role of intermediaries. In this light, is it still necessary for the copyright to benefit corporations (= the intermediaries) more than the authors? Or is this application of the analogue logic to the digital in effect counter-productive, limiting the spread of works, the benefit to the author and author control? Similarly, the Internet and digitalisation could provide for significant additional public benefit by allowing for new transformative uses and access to works formerly practically unavailable, for example out of print or orphan works. Is the larger gain of corporations compared to users necessary, in particular the imbalance in the digital field where exemptions are exceptionally narrow? It seems that those areas where the intermediaries are needed the least actually provide them with the most profit. More research into new models of exploitation and how the balance has to be struck in the digital work is necessary though to answer these questions.

As for culture, it is clear that convergence is not widespread. Although the US, UK and International Level have nearly identical scores in 2010, the variation between their individual dimensions remains strong. Furthermore, Germany has strongly diverged from all three. These findings have a significant impact on the state of knowledge of copyright. In terms of the evolution as such, it is clear that convergence has been limited and even when it has occurred, significant variation remains. Therefore, the differences that can be observed are not just on the surface but

functional: copyright systems continue to understand even fundamental issues differently and as a result respond in varying ways once new challenges arise. There is no such thing as one purpose of copyright and one balance between users, authors and corporate owners.

These findings of a lack of convergence fit a larger pattern of unexpected relationships. First, the case studies have not been close to their respective ideal types in 1880. Therefore, the basic assumption of strong variation early on in the timeframe cannot be confirmed here. This particular pattern has significant repercussions. While no particular country has arguably ever been representative of a legal family on its own, it has been maintained that the legal tradition a country belongs to does have an influence on the shape of copyright provisions and the choices made by the legislators, especially prior to international coordination efforts. However, the analysis here has demonstrated that this is not the case. The ideal types are not good predicators for how a late 19th century copyright law would look like in practice.

In addition, this thesis has shown that case studies have not been subject to one shift carrying them away from their respective ideal types. Rather, the UK, US and International Level have been characterised by oscillating trends and Germany even moved closer to its ideal type during the period examined. However, the national systems did become more coherent over time and therefore settled into their approaches. This was especially unexpected given the instability of the evolutionary trends and the move away from the respective ideal types. Nonetheless, it shows that although the idea of particular copyright traditions has not been defining early on or acted as a pole of attraction as such, it has gained currency over time as the individual copyright components are brought in line with each other. The understanding of how legislation should respond to an issue once it has adopted a point has therefore spread. This means in conclusion that the importance of ideal types as the theoretical underpinning of the policy choices is more relevant later on in the time frame.

Secondly, the explanatory power of the converging influences outlined in the literature is very limited. Technological change does not account for shifts although it may have had a minor contributing influence. In addition, although the individual case

studies have influenced each other, this is in most cases combined with other internal reforms. Here again, the role of exemptions in particular on the overall pattern has not been matched by the theory. This means that while some limited convergence has occurred and countries have shaped each other to some extent, the explanatory framework is largely incomplete. It is necessary to go back to the contemporary literature in an effort to what has shaped policies, in addition to technological issues and cross- national or international coordination, moving the focus away from the legal reasoning to the political realm.

From the data collected here and its analysis, it is clear the main theoretical gap is the evolution of exemptions. Their number has risen in all case studies and they cover similar areas. However, it is not clear why this is. One possible avenue to examine the evolution of exemptions is to draw on interest group theory. A look at the exemptions made clear that certain interest groups were very successful in preventing being subjected to copyright, for example libraries. Taking a more systematic look, theories such as regulatory competition which systemises the influence of interest groups and adds the economic discourse can provide insights. If it can be established that a case study follows a particular understanding of what copyright needs to do to enhance the competitiveness of a country as a whole, the link between them and the particular shape of exemptions may be explainable.

In sum, it is argued here that the missing piece in the puzzle is the political dimension. Copyright is not only shaped by copyright owners but also the influence of users. Answering the question of exemptions is essential because the innovation potential strongly depends on the copyright exemptions, especially if innovation is incremental. It is them which actually determine if a copyright system contributes to the competitiveness of a system as the Knowledge Society based arguments emphasise. Given that the interaction between different interest groups falls within the field of political science, it is most likely that their theories can shed light on the issue. For example, regulatory competition focuses on the question of competitiveness and how interest groups relate to it.

In conclusion, although the literature is able to explain a significant amount of the observable change, there are still significant gaps. The most pronounced one is the lack of explanations for how exemptions have evolved over time. It is proposed here that an examination drawing on political theories on interest groups, especially regulatory competition can make a significant contribution to the debate.

Part 5: Appendix

Appendix 1: Data

The data relating to the methodological calculations used in this thesis can be found in the two Excel data spreadsheet delivered with this thesis.[175] Their particular structure is discussed in this short appendix. The first part will cover the data on culture while the second one focuses on stringency. For a methodological explanation and justification please see chapters 6 and 7. A list of abbreviations can be found in Appendix 4: Glossary of Abbreviations.

Stringency: Copyright Stringency

This section describes the layout of the stringency spreadsheet. There are two kinds of tabs here: those focusing on the individual indicators and then the calculation one.

In the stringency spreadsheet, all tabs except the final one describe the individual indicators. The structure is the same for each of these. The first table describes the data as it is: the data as it drawn from the policy. For example, the number of work types (tab 1) shows that Germany protected 5 different types of works in 1880. The base year value for 1880 is given on the right hand side of the first table. This is calculated by averaging the provisions in Germany, the US and the UK. The second table then is the index value for each time point and case study. In essence, the numerical value in table one is divided by the base year. For example, Germany provides 5 work types in 1880 which is exactly the same as the base year value. As a result, its index value is 1.00. It is these values which are used for the stringency index.

After all of the individual indicators have been transformed into index score, the focus moves to the calculation of the index (tab: index (1880)). For each of the six stringency areas, there are two rows of tables. For example, the first index area is the threshold of protection. The first row shows the index values for the indicators that are used in a particular area. The threshold is made up of four different ones: work types,

[175] To ensure the integrity of the formulas used, it is essential that Excel 2013 is used.

originality, formalities and the impact of formalities. The index values for these four indicators are placed in next to each other in the first row of tables.

The second row contains the actual calculations. The first table (labelled 'scaled by the number of indicators') shows the index value uncorrected. It is the sum of the individual components divided by their number. How the particular indicators are combined has been described in 6.2.2. Stringency Areas.

. The second table is the corrected version. In some cases, the scores are negative because the number of exemptions outweighs all other provisions. However, this is not conceptually possible: as a result, negative values have to be set to 0.[176] 0 here means that there is not any stringency enhancing effect from the provisions. The corrected scores for the six individual areas are then combined to an overall index value. This table can be found at the bottom of the spreadsheet.

In summary, the stringency data sheet contains all the calculations for the stringency index. The first series of tabs refers to the individual indicators and shows how their values were transformed into index scores. The tab 'index (1880)' then demonstrates how these individual indicators were combined to arrive at the area and overall stringency scores.

[176] The six areas are distinct und independent of each other. If negative values would be permitted, weak provisions (for example in moral rights) would reduce the level of stringency in the other areas. This contradicts the underlying logic of a Laspeyres index and have it was applied to copyright.

Culture: Copyright Culture

The calculations for culture are divided into four major blocs: preparatory; the classifications; calculations and analysis.

The first two tabs in the spreadsheet are preparatory. Their main purpose is to summarise the underlying data as generated by the coding and processing methodology[177] and to determine the classification scheme for each of them. The 'data' tab contains all the information drawn from the policies. It is the collection of all indicators which represent values and numbers.

The second tab is the classification schemes used to place individual indicators on the 1 to 5 spectrum.[178] The first two tables contain the formulas used for the actual classification of indicators. They determine the lines between the 5 individual categories that are possible in the 1-5 CL- AR spectrum.[179] For example, if the maximum value in the sample is 10, then the minimum score required to score a 5 is 9 because it has to be at least 81% of the maximum value. The formulas are identical in both tables and only the column headings vary, depending on if an indicator is linked to AR or CL. The tables below are the classification schemes as they apply to the specific indicators, in particular their relationship to the ideal types. For each indicator, the appropriate one of the first two tables was selected and linked in. The actual spectrum has to be based on the indicator's maximum value in the sample at each point in time. As a result, all of the values in the sample (the information is drawn from the 'data' tab) are represented on the right hand side of the table from which the highest value is automatically selected into the 'maximum value' column. Based on this, the borderlines between the classification categories are defined for each indicator. In sum, the classification scheme for each specific indicator is created.

The second group of tables are the classifications ones (one for each case study). The purpose here is to place the indicator values which a case study has on the 1-5 spectrum. To do this, its values have to be compared to the classification schemes created in the previous section. The first table in this tab is the information drawn from

[177] For a detailed explanation, please see Part 2: Methodology for Copyright Stringency and Culture.
[178] For a methodological explanation, please see 7.3 The Classification of Variables.
[179] It should be noted that if the value in the 'maximum value' column is changed, then the borderlines between the different spectrum positions shift accordingly.

the data tab and therefore the indicator values as they are. The second table is the data value's equivalent on the 1 to 5 spectrum. The table contains the formulas used to place a particular indicator, relying on the borderlines defined in the 'classification scheme' tab (which are for this purpose copied at the bottom of the spreadsheet). In addition, the data drawn directly from the legislation, for example the Act Structure, are also included at the end of the classification table. The definition of these indicators can be found in 7.2 The Ideal Types as Comparative Standards. In sum, all the data has now been placed on the 1-5 spectrum.

The third group then are the calculation tabs. Again there is one tab for each case study. The first table in a calculation tab is taken from the 'classification' tab for the relevant case study. It is the classified values (the data placed on the 1 to 5 spectrum). These indicators are then combined to form the individual dimensions in the same way as has been outlined in 7.4 Calculation and especially Table 26: Spectrum outline for the classification for ideal types. The tables 2- 12 represent these individual cultural dimensions and the relevant indicators for each of them. The right hand column of each of them shows the average score and therefore the dimension score. Table 13 (the final table at the bottom of the spreadsheet) then combines these dimension scores to arrive at the overall cultural value.

The final group of tabs are the analysis one. First, there is 'comparison of culture' tab which summarises the dimension and overall scores for each case study. It is followed by a series of tabs labelled by the name of the case study it concerns. In each of them, there are four tables. The first one shows the cultural scores as they had been calculated in earlier tabs. To the right hand side of this is the second table which presents the standard deviation and CV scores for each time point. The third table is below and reflects the difference between the case studies' scores and the respective ideal type for each point in time. Finally, the fourth table calculates the convergence rates which is based on the differences shown in the third table.

In sum, the culture data sheep provides all the required information and calculations to trace the original data drawn from the policies to the final cultural score as well as the calculations based on them. It provides the underlying data and the

classification scheme for each indicator. These two are then combined in the 'classification' tabs to place the original data on the 1 to 5 spectrum. The 'calculation' tabs then show the actual calculations, especially how the individual indicators were combined to arrive at the dimension and overall cultural scores. Finally, analysis tabs summarise the cultural scores and provide the calculations based on them.

Appendix 2: Alternative Values

As the methodology has outlined, both ordinal indicators and those based on ungrouped data are not calculated in comparison to a maximum value in the sample. Instead, values are assigned on the basis of the specific characteristics defined in advance.[180] For example, the absence of protection for neighbouring rights will score a 5 for the scope of neighbouring rights indicator because rejecting neighbouring rights as copyright-able is archetypical for AR.[181] However, assigning values rather than calculating them introduces an inherent degree of subjectivity. Any judgement naturally depends to some degree on the person carrying it out, irrespective of how detailed the definitions are (R. Lawless et al. 2010). To at least partially account for this issue, the variations were recorded for those situations where more than option could be justified.

In practice, variation can affect the following indicators because they all rely on the author's judgement:

- Act Structure
- Focus of Protection
- Originality
- Ownership
- Scope of NR
- Scope of Protection for Foreigners
- Contract (law)

It should be noted that all of these indicators are used for the analysis of culture but only the originality indicator is relevant for stringency as well. This section now describes which indicators were actually affected in this study and to what extent this has an effect on the conclusions drawn in this thesis.

[180] For an explanation of the methodology, please see 7.2 The Ideal Types as Comparative Standards.
[181] For the full description, please see 7.2.8 Protection of NR.

Differences

This section will outline which indicators have experienced issues at the classification stage in practice and why. It is important to discuss them together because the stringency methodology can potentially develop effects beyond the case study actually experiencing the difficulty. If an indicator is amended in 1880, then this affects the base year value for this specific indicator. This in turn has repercussions for all case studies' index values at all points in time.[182] On the other hand, the effect on culture is limited to the case study in question. These indicators are not calculated in relation to the maximum value in the sample. Instead, it is the specific characteristics on which the classification is based. This also means that the relative position to other case studies is not relevant here.

The UK has been in practice unaffected by the variation issue. None of the indicators here is characterised by a lack of consensus. For the International Level, only the level of originality between 1960 and 1990 is affected. The 1952 UCC advocates a lower level of originality ('judgement- skill/labour') than the Berne Convention ('judgement') (P. Goldstein 2001: 28; P. Goldstein 2003: 151- 152). However, the extent to which this changes the originality level at the International Level as a whole depends on how important the UCC is perceived as a whole. If the UCC is seen as an equal agreement to the Berne Convention, then it can be argued that the overall originality has not fallen. Essentially, the Berne Convention prevents it. This is the interpretation taken in the main body of this thesis. However, the UCC can be seen as more influential than the Berne Convention because its membership was larger (UNESCO 2012; WIPO 2013a). In this case, the originality level for the International Level needs to be lowered accordingly: from 'judgement' to 'judgement- skill/labour'. The dispute is not relevant anymore after 1990. The TRIPs agreement is based on the Berne Convention and explicitly refers to it. This definitely reduced the importance of the UCC, to a point where its provisions only govern in very few instances today.[183] This appendix will examine the effects of treating the UCC as dominant. In summary,

[182] All index values are calculation in relation to a base year. For a more detailed explanation, please see 6.4 The Stringency Index.

[183] The membership of the Berne Convention and the UCC strongly overlaps but is not identical.

the International Level's originality level is amended as a result of the UCC and shifts from 'judgement' to 'judgement- skill- labour' between 1960 and 1990.

The US also only presented a classification issue in the area of originality. For most of the timeframe (1880-1990), it is clear that the US only required 'skill/ labour' to be present for a work to be considered copyrightable. However, the 1992 *Feist* case arguable changed this by requiring judgement (Feist Publications, Inc. v Rural Telephone Service Company, Inc. 1991). This is the argument adopted in the body of the thesis. Accordingly, the indicator rose by two categories from 'skill/ labour' to 'judgement' between 2000 and 2010. However, it is also possible to take a more limited stance. Although the case refers to some degree of judgement, it can be argued that the 'skill/ labour' standard was not fully replaced. As a result, the originality level only moves from 'skill/ labour' to the 'judgement- skill/ labour' category. This appendix will adopt the more limited influence argument, assuming an originality level of 'judgement- skill/ labour' between 2000 and 2010.

Germany was more extensively affected by uncertainty on the particular indicators. There were two indicators with classification issues. The first one was the originality level which shows variation for most of the timeframe. Until the 1965 Urheberrechtsgesetz, the common attitude refers to a level of 'creativity- judgement', especially in the case law.[184] However, the statute is less demanding and there have been cases advocating a significantly lower threshold.[185] The lower level of protection matches the definition for the 'judgement- skill/ labour' originality category. In sum, between 1880 and 1960, the main thesis relies on the high level of originality. In this appendix now, the 'judgement- skill/labour' one will be adopted.

The second unclear instance is the originality level in 2010. Essentially, the EU has started to harmonise copyright and preferred the originality at the 'judgment- skill/ labour' level (G. Davies 2002: 345- 346). If this is pressure is considered sufficient however depends on how much influence is attributed to the EU. If the EU is seen as

[184] In the extreme, even letters were at some point found to lack the required originality for copyright protection (41 RGZ 43 (1998)).
[185] For example, a catalogue was granted copyright on the basis of judgment in the sorting of a catalogue (70 RGZ 266 (1909)).

influential on the member states, then the originality level needs to be amended for Germany. As a result, the originality level needs to be lowered from 'judgement' to 'judgement- skill/ labour'. However, if the EU influence is seen as limited, especially since the threshold is not clearly defined and the legislation is a directive and not a regulation,[186] then the impact can be justified as insufficient. This appendix will now assume that the EU has had this influence. Therefore, the originality level for 2010 is lowered to 'judgement- skill/labour'.

The second affected indicator is the ownership one. In the 1965 Urheberrechtsgesetz, the line between authors and copyright owners is not clearly drawn. On one hand, the rights attached to neighbouring rights are owned by the employer. On the other hand, there are significant limitations on contractual rights which protect authors (and performers). As a result, it depends on how one weighs these two aspects. In the main thesis, the emphasis was placed on the contractual limits. As a result, the ownership indicator is classified as a 4: 'tilted towards the author'. In this appendix now, it will be argued that the protection depends entirely on the type of work in question, emphasising the first ownership rules. As a result, the ownership indicator is assigned the score 3. The variation is limited to 1970 to 1990 as reforms after 1990s give additional guarantees to authors, shifting the indicator to a clear 4. In summary, the ownership provision is lowered from 4 to 3 between 1970 and 1990.

In conclusion, there are two indicators for which more than one value can be reasonably assigned. The most common one is the level of originality. This affects the US, International Level and Germany. In addition to originality, Germany's ownership classification is also not entirely clear. Since the values differ from the ones used in the main body of this thesis, the conclusions previously drawn have to be re-examined.

[186] Only a regulation is binding in its all components. Directives give member states leeway in how they implement the legally binding goal.

Impact of the Variation

This thesis has examined the following propositions and drew conclusions on each of them. The following table summarises them.

	Proposition	Conclusion
1	Stringency levels have increased over time.	The level of overall stringency has risen between 1880 and 2010. However, there have been significant instances of falling stringency levels, too.
2	Technological innovation has caused the rising levels of stringency.	Most of the rise in stringency levels has been a response to the development of new technologies and how these were incorporated into copyright policies. Digital works are affected by the most stringent provisions.
3	The effect of stringency on the individual case study has been particular pronounced in the digital age.	The digital age has developed an effect, mainly in the area of exemptions.
4	Corporations have over-proportionally benefited from rising stringency levels in comparison to users.	Corporations have not benefitted more from copyright reforms than users.
5	Corporations have over-proportionally benefited from rising stringency levels in comparison to authors.	Corporations and not authors have benefited from copyright reforms.
6	Copyright systems have converged over time.	The copyright policies of the UK, the US and the International Level have become more similar over time although the extent is limited. Germany has not converged.
7	Older copyright policies will show the strongest link to the traditional cultural approach.	Legal traditions have some but only a very limited relevance early on in the timeframe.
8	Copyright policies have moved way from their respective ideal types over time.	Copyright policies in the US, the UK and at the International Level have become hybrids over time but Germany has not.
9	Copyright policies have become increasingly settled over time in how they perceive the purpose of copyright time.	Copyright policies have become more coherent over time and therefore across the different policy areas.
10	The cultural convergence of copyright has been caused by technological innovation.	Technological innovation has not contributed to the convergence of copyright policies.
11	The cultural convergence of copyright has been caused by individual actors.	The influence of an actor on another explains some of the cultural convergence.

Table 44: List of propositions that have been made in the literature and the conclusions drawn on the basis of the empirical evidence.

Given that the data has now been amended, it is necessary to re-examine each of these propositions to see if any of the conclusions has been affected by the changes.

Impact on Stringency Observations

The main thesis examined a series of propositions relating to copyright stringency (**Error! Reference source not found.**). First, it was confirmed that the overall stringency levels increased strongly but the trend was not continuous. Much of this change can be explained by technological innovation and the response of copyright to them. Secondly, it also analysed the distribution of copyright benefits over time. It concluded that copyright owners have benefitted more than authors but remain in balance in comparison to users with the exception of digital works.

For stringency only one of the possible indicators is relevant: originality. However, originality is already affected in 1880 because of the changes in Germany. This means that the base year is also influenced: it increased from 4 to 4.67 as Germany's originality stringency level increased from 2 to 4. This has repercussions for all case studies.

year	Germany (original values)	Germany (amended values)	US (original values)	US (amended values)	UK (original values)	UK (amended values)	International Level (original values)	International Level (amended values)
1880	0.50	0.86	1.25	1.07	1.25	1.07		
1890	0.50	0.86	1.25	1.07	1.25	1.07	0.75	0.64
1900	0.50	0.86	1.25	1.07	1.25	1.07	0.75	0.64
1910	0.50	0.86	1.25	1.07	1.25	1.07	0.75	0.64
1920	0.50	0.86	1.25	1.07	1.25	1.07	0.75	0.64
1930	0.50	0.64	1.25	1.07	1.25	1.07	0.75	0.64
1940	0.50	0.64	1.25	1.07	1.25	1.07	0.75	0.64
1950	0.50	0.64	1.25	1.07	1.25	1.07	0.75	0.64
1960	0.50	0.64	1.25	1.07	1.25	1.07	0.75	0.43
1970	0.50	0.64	1.25	1.07	1.25	1.07	0.75	0.43
1980	0.50	0.64	1.25	1.07	1.25	1.07	0.75	0.43
1990	0.50	0.64	1.25	1.07	1.25	1.07	0.75	0.43
2000	0.50	0.43	0.75	0.86	1.25	1.07	0.75	0.64
2010	0.50	0.43	0.75	0.86	1.00	0.86	0.75	0.64

Table 43: Comparison of stringency values of the originality indicator for Germany, the US, the UK and the International Level.

The first observation is the result of the methodology itself. The effect of the changes to originality is most pronounced for the stringency indicator itself and less so at the threshold of protection (see Table 44 and Table 45).[187] For Germany, the amended originality threshold was 72% higher in 1880 but 14% lower in 2010. However, the impact on the threshold of protection as a whole is more limited. The amended values are 12% lower in 1880 and 2% higher in 2010. Therefore, the effect at the threshold level has fallen over time. In sum, changes to the originality indicatory have significantly affected the stringency score for the indicator itself. However, the effect at the threshold level has decreased over time and is very small (2%) by 2010.

[187] The threshold of protection is the average of the provisions for the number of work types, the originality level, the number of formalities and the impact of formalities.

The US has seen a similar pattern. It should be noted though that all the amendments between 1880 and 1990 are the result of base year changes. Its originality indicator itself was only adjusted between 2000 and 2010. In 1880, the originality indicator is 14% lower than it was previously. However, in 2010 the originality threshold was 15% higher. At the threshold of protection level, the value was 18% larger in 1880 and is 3% smaller in 2010. As was the case with Germany, the indicator level itself is affected significantly and continuously over time. However, the impact on the threshold of protection falls over time and is limited in 2010.

For the International Level, the change is 15% lower in 1890 and 2010. This is line with the observations in the case studies: a significant, stable impact on the indicator level. At both time points, the effect is created by the base year changes. However, the effect on the threshold of protection has always been limited here. The differences in both 1890 and 2010 exist but the scores are only 3% higher in 1890 and 2% in 2010. However, it should be noted that the differences between 1960 and 1990 and therefore when the originality amendments affect the indicator are larger. In 1960, the difference is 15% and 13% between 1970 and 1990. In conclusion, the International Level has seen little overall effect on the threshold of protection but the originality indicator is affected, especially during the time period when its own provisions were amended.

In the UK, the change is less extensive and only the result of base year changes. The values for originality indicator are 14% lower in 1880 and 13% lower in 2010. Therefore, the differences are significant but have been stable over time. Furthermore, like with Germany, the effect has been less pronounced at the threshold of protection level: 9% higher in 1880 and 3% higher in 2010. In conclusion, the amendments of the originality indicator's base year affect mainly the indicator itself and continuously do so over the timeframe examined here. However, the effect at the threshold level is declining over time and is marginal in 2010.

year	Germany (original values)	Germany (amended values)	US (original values)	US (amended values)	UK (original values)	UK (amended values)	International Level (original values)	International Level (amended values)
1880	0.74	0.65	0.22	0.26	0.54	0.59		
1890	0.74	0.65	0.22	0.26	0.47	0.51	0.91	0.94
1900	0.74	0.65	0.19	0.24	0.47	0.51	1.16	1.19
1910	0.99	0.90	0.19	0.24	0.47	0.51	1.21	1.24
1920	0.99	0.90	0.24	0.29	1.09	1.14	1.21	1.24
1930	0.94	0.90	0.24	0.29	1.14	1.19	1.21	1.24
1940	0.94	0.90	0.24	0.29	1.14	1.19	1.21	1.24
1950	0.94	0.90	0.24	0.29	1.14	1.19	1.21	1.24
1960	0.94	0.90	0.24	0.29	1.19	1.24	0.51	0.59
1970	1.16	1.13	0.24	0.29	1.19	1.24	0.58	0.66
1980	1.16	1.13	0.39	0.44	1.12	1.16	0.58	0.66
1990	1.21	1.18	1.04	1.09	1.17	1.21	0.58	0.66
2000	1.26	1.28	1.09	1.06	1.34	1.39	0.69	0.71
2010	1.26	1.28	1.09	1.06	1.29	1.33	0.69	0.71

Table 44: Comparison of stringency values for the threshold of protection for Germany, the US, the UK and the International Level.

The discussion up to this point has shown that the effect at the threshold of protection stringency area is small. However, the impact of the changes on the level of stringency needs to be examined nonetheless because differences at the threshold level are carried forward to the overall stringency level.

year	Germany (original values)	Germany (amended values)	US (original values)	US (amended values)	UK (original values)	UK (amended values)	International Level (original values)	International Level (amended values)
1880	3.28	3.37	1.86	1.82	2.61	2.66		
1890	3.28	3.37	1.86	1.82	2.73	2.78	1.62	1.64
1900	2.90	2.99	1.99	1.95	2.73	2.78	1.81	1.84
1910	16.06	16.15	2.33	2.29	3.52	3.56	2.29	2.32
1920	15.81	15.90	2.38	2.34	14.11	14.16	2.29	2.32
1930	15.63	15.66	2.38	2.34	25.73	25.77	2.72	2.74
1940	19.71	19.74	2.38	2.34	25.73	25.77	2.72	2.74
1950	19.71	19.74	2.12	2.08	25.73	25.77	3.59	3.61
1960	19.49	19.52	2.12	2.08	27.93	27.98	3.05	3.13
1970	13.66	13.70	2.12	2.08	27.91	27.95	11.80	11.88
1980	13.38	13.42	19.21	19.17	28.24	28.28	12.59	12.67
1990	18.24	18.27	19.71	19.67	23.14	23.18	12.82	12.90
2000	23.82	23.80	38.49	38.51	23.44	23.49	28.41	28.44
2010	21.04	21.02	37.92	37.95	23.97	24.01	28.41	28.44

Table 45: Comparison of the stringency index for original and amended values for Germany, the US, the UK and the International Level.

There are two important observations. First, the differences in the overall stringency levels are very small. The difference in Germany in 1880 is 2% higher and 1% lower in 2010. For the US, the value is 3% lower in 1880 while the scores are practically identical in 2010. At the International Level, the 1890 values are within 1% of each other in both 1890 and 2010. Finally, in the UK the index scores are 2% higher in 1880 and nearly the same in 2010. In conclusion, the effect of amending the originality level is very small in 1880 and in 2010. This is not surprising given that most of the variation was already reduced at the threshold of protection level.

Secondly, despite this, the changes in 1880 do affect the relative increases. A minor change in the comparatively small index scores in 1880 develops a major impact when the percentage increases are calculated. The relative rises are smaller for those case studies were stringency levels in 1880 have increased. In Germany, the increases

have been 541% and 523% for the original and amended levels. The overall increase was 818% and 802% respectively in the UK. Similarly, the International Level's increase was 1654% for the original values and 1634% for the amended ones. However, the increases were higher if the stringency levels had fallen in 1880. In the US, the original values saw an overall increase of 1038% while the alternative values rose by 1085%. In conclusion, the differences are mainly relevant in the relative overall increases but less so for the actual index score.

The changes to originality have not affected the pattern of relative stringency positions. The ranking remains the same with Germany being the most stringent, followed by the UK, the US and the International Level in 1890. By 2010, the US is the most stringent; the International Level is in second place while UK is third and Germany fourth. The identical ranking is not surprising given that the actual difference between the two sets of stringency values is small.

In addition, because only originality is amended, the impact is limited to the threshold of protection where originality is directly used in the calculations and by extension in the overall stringency level. This also means that none of the patterns observed here, in particular the distribution of benefits between copyright owners and users and authors are affected by the changes nor is the importance of technology as a causal factor. None of these use the originality indicator or the threshold of protection area directly. They therefore also do not need to be re- examined.

In conclusion, all four case studies show the same pattern. At the originality indicator level, the effect has been noticeable, ranging between 72% in 1880 for Germany and 14% -15% for the remaining three case studies. The closeness of the US, the UK and the International Level is linked to the change in the base year. By amending the base year, its index scores have changed although their actual indicator value as such was not amended. This also explains why their variation remained stable over time. Germany necessarily has seen more change because its change is a combination of the change in base year (which it caused) and the amended value for the actual indicator. In addition, the effect of the amendments is significantly more limited at the threshold of protection level. In 2010, it only ranged from 2% to 3%. This

decline in effect can be explained by the effect of the other indicators as well as standardising the result by their number. Finally, the amendments have not caused a change in the relative stringency positions between case studies nor has it affected any of the particular points examined in greater detail in the main body of this thesis. In sum, amendments to the originality indicator have affected the stringency levels of this indicator and to a more limited extent also the threshold of protection and overall stringency levels. However, it not affected the conclusions previously drawn.

Impact on Culture

The second set of propositions focused on cultural change (**Error! Reference source not found.**). In particular, it was first examined if the case studies were close to their ideal types in 1880 in an effort to assess how important legal tradition was at this point in time. The results showed that although legal tradition is reflected in them, the extent is limited significantly. The variation can be explained relying on the literature though and should have therefore not come as a surprise. Secondly, the overall trend in comparison to the respective ideal type was analysed. Only the UK, US and the International Level moved away from their respective ideal types as had been expected although the actual extent of the shifts has been rather small. Germany however strongly moved towards it. Its ideal type therefore gained in importance rather than lose it. Thirdly, the inter-dimensional variation was investigated to examine if individual case studies are coherent in their approach or if their attitudes on particular issues varies widely. It was shown that they all became increasingly coherent over time, irrespective of the direction of their movement.

year	Germany (original values)	Germany (amended values)	US (original values)	US (amended values)	UK (original values)	UK (amended values)	International Level (original values)	International Level (amended values)
1880	3.1	*2.9*	2.1	2.1	2.5	2.5		
1890	3.1	*2.9*	2.1	2.1	2.2	2.2	3.5	3.5
1900	3.3	*3.1*	2.0	2.0	2.4	2.4	3.5	3.5
1910	4.0	*3.8*	1.9	1.9	2.3	2.3	3.4	3.4
1920	4.1	*3.9*	2.0	2.0	2.7	2.7	3.3	3.3
1930	4.2	*4.1*	2.0	2.0	2.8	2.8	3.6	3.6
1940	4.2	*4.1*	2.0	2.0	2.8	2.8	3.6	3.6
1950	4.1	*4.1*	2.0	2.0	2.8	2.8	3.7	3.7
1960	4.1	*4.1*	2.0	2.0	2.8	2.8	3.1	3.0
1970	4.2	*4.1*	1.9	1.9	2.7	2.7	2.9	*2.8*
1980	4.2	*4.1*	1.9	1.9	2.6	2.6	2.8	*2.7*
1990	4.2	*4.1*	2.4	2.4	2.4	2.4	2.9	*2.8*
2000	4.2	4.2	2.7	*2.6*	2.5	2.5	2.9	2.9
2010	4.1	*4.0*	2.7	*2.7*	2.7	2.7	2.9	2.9

Table 46: Comparison of cultural scores between the higehr and amended values for Germany, the US, the UK and the International Level.

Table 46 presents the original and amended overall cultural scores for each of the case studies.[188] The time points when changes have affected any of the indicators are presented in *italics*. As expected, there has not been any effect on the UK. The cultural scores for are identical. This also means that none of the observations made on its evolutionary pattern are affected.

Germany shows the most extensive differences in terms of indicators and this is reflected in the variation between the original and amended values. However, even here the impact is rather limited. The maximum cultural change in Germany is 0.2 and this occurs mainly early on (1880- 1920). This is not surprising given that the disagreement on the level of originality is most pronounced at this point. In addition,

[188] Original values refers to the values used in the main body of this thesis which are higher on the individual indicators. Lower values are the ones used in the annex only.

the Protection of NR does not play a role yet at this point in time, emphasising the effect of the remaining dimensions.[189] However, from 1930 onwards, the difference is only 0.1 and therefore very small.[190]

The implications for this in analytical terms are most clearly identifiable for the importance of the tradition early on in the timeframe. In particular, Germany is further away from its ideal type (2.2) in 1880 than to the ideal CL (1.8) with a score of 2.8. Therefore, the finding that the ideal type had little influence in 1880 is amplified. The additional difference needs to be attributed to a lack of emphasis on case law in the literature (70 RGZ 266 (1909)). Nonetheless, the other contributing factors highlighted in 10.2 The Importance of Ideal Types over Time still apply (for example the limits on protection or the state of moral rights) because there is not any variation in these indicators. In conclusion, the distance to AR in 1880 is larger and therefore the importance of AR is reduced. This reinforces earlier findings and the explanations outlined before still apply and explain most of the variation. Only the importance of case law needs to be added.

Secondly, the overall trend characterised of a pronounced move towards AR is still the same. The values strongly rise over time from 2.9 to 4.0 which in turn reduced the distance to the AR ideal type from 2.2 to 1. Because the starting point is closer to CL, the trend is even slightly more extensive than the trend based on the original values. The overall increase is 1.2 while the original value trend only rises by 1. In summary, the trend in comparison to the ideal types is identical.

Thirdly, the trend in copyright coherence is also the same as previously identified. As Table 47 shows, the CV scores are original for the values derived from the amended values than the original values. The difference is the largest in 1910 with a variation of 0.9 and the smallest in 2000 when there is not any difference at all. Nonetheless, again the trend is identical: the coherence of the German copyright policy increased over time as the CV values fall. In conclusion, although the German is

[189] There are between 1880 and 1910 only 10 relevant dimensions rather than 11. Therefore, each of them gains in importance because the overall cultural score is the average of dimensions at a given point in time.

[190] This is the result of adding the 11th dimension in 1920 because the UK now provided protection for sound recordings.

less coherent when the amended values are used rather than the original ones, the overall pattern of falling inter- dimensional variation has not been affected.

The US and the International Level are both affected by a difference in the originality threshold of one unit between the original and the amended values. Although the exact timing differs, the effect is the same: a fall in the overall convergence score of 0.1. For the International Level, this is observable between 1960 and 1990 and for the US only in 2000.[191] A change of 0.1 is very small and has therefore not changed the nature of the case studies when it is compared to the ideal types.

The changes in the values do not affect the evolutionary findings of this thesis. First, none of the amendments here affects the case studies in 1880, therefore the conclusions drawn on the importance of the ideal types historically are not affected. In addition, the difference is small and constant which means that it replicates the overall evolutionary trends. Therefore, the long- term evolutionary pattern in comparison to the ideal types also remain the same as previously described. Both of them move away from their respective ideal types.

Finally, there has also not been a change on the pattern of coherence. Actually, the change in the US did not have any coherence impact at all. This means that considering the originality level at the amended threshold is actually in line with existing provisions. As for the International Level, the lower originality threshold has actually enhanced the overall consistency of the system. The CV scores between 1960 and 1990 are lower than they were before. The impact is limited though because once the change has taken effect, it remains at this level. Furthermore, the amended values are in line with the long- term pattern previously identified. The inter-dimensional variation at the International Level is falling over time.

[191] The change in originality affects both 2000 and 2010 but is not any impact on the overall score in 2010.

year	Germany (original values)	Germany (amended values)	US (original values)	US (amended values)	UK (original values)	UK (amended values)	International Level (original values)	International Level (amended values)
1880	0.26	0.37	0.54	0.54	0.49	0.44		
1890	0.27	0.37	0.54	0.54	0.53	0.48	0.37	0.34
1900	0.29	0.38	0.49	0.49	0.53	0.48	0.37	0.34
1910	0.21	0.31	0.48	0.48	0.52	0.47	0.38	0.35
1920	0.22	0.15	0.40	0.40	0.51	0.51	0.21	0.21
1930	0.19	0.17	0.39	0.39	0.50	0.50	0.18	0.18
1940	0.20	0.17	0.39	0.39	0.50	0.50	0.18	0.18
1950	0.20	0.17	0.39	0.39	0.50	0.50	0.17	0.17
1960	0.20	0.17	0.36	0.36	0.49	0.48	0.20	0.16
1970	0.13	0.10	0.35	0.35	0.49	0.49	0.20	0.17
1980	0.13	0.10	0.39	0.39	0.46	0.45	0.19	0.17
1990	0.13	0.09	0.43	0.43	0.36	0.36	0.20	0.17
2000	0.09	0.09	0.36	0.36	0.40	0.40	0.20	0.20
2010	0.11	0.08	0.35	0.35	0.35	0.35	0.21	0.21

Table 47: Comparison of CV scores between the original and amended values for Germany, the US, the UK and the International Level.

In conclusion, using the amended values has only had a very small impact. Although the changes do affect the cultural values on their own, the effect is very limited in scope and for the US and the International Level also in timing. When the amended cultural scores are examined in light of the prepositions investigated in this thesis, there is also not any significant impact. In respect to Germany, only the legal origin was really affected but even here, the findings only amplified the argument and did not contradict it. For the International Level and the US, there has been not been any effect at all. The original findings do still apply entirely in relation to the importance of the legal tradition, overall cultural trends and the coherence of copyright systems. In sum, there has been a very small change in cultural scores but it has not significantly affected the conclusions. Given that there has been some change

though, the question now arises if there has been any effect on the observable cultural convergence patterns.

The first major observation is that the convergence clubs remain the same. This means that Germany has not converged with any other case study. The distance between it and the other case studies is larger in 2010 than it was in 1890.[192] Nonetheless, the US, the UK and the International Level still form a convergence club. Given that the 1890 and 2010 scores are identical for both original and amended levels in the US and the International Level, the overall extent of this is the same as well: 0.4 to 0 between the US and the UK, 0.2 between the US and the International Level and 0.2 between the UK and the International Level.

In terms of the actual degree of convergence, measured by the CV, the picture is also the same. There has been a very small increase in the inter-dimension variation between the US and the UK (0.36 in 2010 rather than 0.35) and between the US and the International Level (0.31 rather than 0.3). However, there has not been any change in the combined value between all three case studies: it is still at 0.31 in 2010. Overall, the effect of the change is so small that it is not of any significance. It definitely does not change the conclusion of more variation between dimensions than the overall score would indicate.

The second question is if the driving forces are still the same as previously identified. The overall scores make it clear that technology has not developed an impact on convergence. The introduction of neighbouring rights in the individual case studies is not accompanied by changes to their approach to copyright and therefore cultural change.[193] This is line with the findings in the main body of the thesis.

The thesis also examined the role of individual actors on convergence, focusing on actual instances of convergence.[194]

[192] Convergence was discussed from 1890 onwards because the International Level does not have any scores for 1880.
[193] UK in 1960, Germany and the International Level in 1970 and the US 1980.
[194] For detailed accounts of the pattern and relevant causal forces for the individual convergence periods, please 11.3 The Role of Actors.

The periods of convergence are the same:

- 1910-1920: UK and the International Level
- 1950-1960: US and the International Level
- 1980-1990: US and the International Level; US and Germany
- 1990-2000: US and the International Level
- 2000-2010: EU and UK; EU and Germany; US and Germany; UK and the International Level

The effect of changes in the US is limited to 2000 and 2010 and the International Level to 1960 to 1990. As a result, the first convergence phase (UK-International Level) can be excluded because there were not any relevant amendments in the data at this time. In addition, because neither the UK nor the EU was affected at all, the 2000 to 2010 convergences between the EU and the UK and the UK and the International Level can also be excluded from re-examination. The remaining instances will now be discussed in order.

The 1950 to 1960 convergence between the US and the International Level reduced the distance between them from 1.7 to 1.2. Using the amended values, the convergence is from 1.7 to 1.1 and therefore by 0.1 stronger than before. The reasons previously identified still apply: amendments to the formalities and the protection of foreigners, as well as external changes based on UK reforms. In addition though, the lower originality level at the International Level has caused a convergence in this indicator. The distance between the two case studies fell from 2 to 1 between 1950 and 1960 while it remained at 2 previously. Given the US influence on the UCC (P. Goldstein 2001: 28) and its preference for a low originality threshold, it is credible to assign additional change to the US. However, as already mentioned, the additional convergence is limited to 0.1 and therefore not very extensive. In sum, the degree of convergence is stronger and this additional change can be attributed to the US.

The next convergence period is 1980 to 1990. Originally the US and the International Level converged from 0.9 to 0.5 in this interval. Now, the change in difference is from 0.8 to 0.4. It has been previously highlighted that once the effect on the case studies of amending the values is constant. As a result, its effect is limited to the point of first introduction. This explains why the strength of convergence has not changed: it remained at 0.4. Similarly, given that originality did not play a role in this

convergence, the causal factors have also not changed. By extension, this also means that there not any relevant changes to the relationship between the US and Germany for which the convergence is a secondary effect of the influence of the International Level. In sum, the 1980- 1990 convergence period remains unaffected.

The third interval is between 1990 and 2000 and again affects the International Level and the US. The distance based on the original values fell from 0.4 to 0.2. Now, the change is more limited: from 0.4 to 0.3. The original convergence was largely caused by the rising originality threshold in response of the *Feist* case in addition to a serious of domestic reforms in the US. Here, the lower originality threshold does make an impact. For the US, the originality levels now only rose 1 to 2 rather than from 1 to 3. As a result, the convergence in this area is more limited than it was before. At the same time, the International Level's originality level rose from 2 to 3 because of the growing importance of the Berne Convention. This means that the convergence in this dimension is now absent. In conclusion, it is the remaining domestic changes emphasises previously which explain the convergence here while the originality is not a cause anymore.

The EU and Germany have converged between 2000 and 2010. The distance between them fell from 0.9 to 0.6 but this change has not been the result of any direct influence. Using the amended values, the extent of convergence has increased from 0.7 to 0.5. The smaller convergence is the result of a Germany's lower score in 2000 and 2010 (4.1 and 4 rather than 4.2 and 4.1) while the EU has not seen any change. In terms of driving forces, originality needs to be added. The distance falls from 1 to 0 here and this can be linked to the EU (G. Davies 2002: 345- 346). The importance of this is amplified by the lower overall change. However, none of the other causal factors are affected. In sum, if a stronger effect is assumed on Germany, then the EU turns into one of several driving forces between Germany and the EU.

Germany had also converged with the US between 2000 and 2010. Here, the distance fell from 1.5 to 1.4 between 2000 and 2010. Using the amended values, the convergence is more pronounced 1.6 to 1.3. This additional change can be explained by the originality dimensions. The difference here fell from 2 to 1. However, this does

not change the actual causal forces. The German originality amendment is driven by the EU while the US one is domestic (Feist Publications, Inc. v Rural Telephone Service Company, Inc. 1991). In addition, the remaining change is still the same as previously identified. In sum, the stronger convergence observed here is not linked to the US influencing Germany or vice versa. This means that while the extent of convergence is larger, the causality for this is unaffected.

In conclusion, the impact of the amended values on the degree of convergence is very small. While the overall scores are identical in the beginning and the end of the timeframe, the inter- dimensional variation has only increased very slightly. This is not enough to be considered significant. In addition, the effect on causal forces has also been limited. The majority of convergence instances are either not affected at all or the causality remains unchanged. The extent of an actor influencing another has only been extended twice: the US influence on the International Level between 1950 and 1960 and the EU's impact on Germany between 2000 and 2010.

Conclusion

This appendix has examined the impact of uncertainty in the classification of particular indicators. It has been clarified that the originality indicator has posed issues for Germany, the US and the International Level and the ownership one only for Germany. There have not been similar difficulties with the UK and the EU. The effect of these possible amendments are limited though in practice.

As this appendix has shown, the effect of amendments to the originality and the ownership indicators has not changed either the cultural pattern previously observed nor has it contradicted any of the conclusions drawn from them. The effect on stringency is only significant for the indicator itself but small at the threshold level and marginal at the overall stringency level. The only impact it has is on the relevant increases. In addition, because only originality is affected, the amendments are not relevant for assessing the role of technology or the distribution of benefits. In terms of culture, the importance of legal tradition, long- term trends and coherence are the same. Furthermore, technology remains without a converging effect while the majority

of individual actor influences also remains the same. The only effect is the stronger impact of the US between 1950 and 1960 on the International Level and the EU on Germany between 1990 and 2000. Overall therefore, the choice of indicators in favour of the original values has not systematically biased the results and conclusions drawn from it.

Appendix 3: Base Year[195]

This thesis uses a Laspeyres index to determine the change in stringency levels over time. The method is based on the standardisation of values by using a base year. This ensures that the data from the different constitutive components can be combined and compared over time. The base year therefore forms a common standard of reference for the values. [196] Although the thesis' main body relies on 1880 as the base year for reasons mentioned before,[197] this choice was not the only possible one. In this annex now, the evolutionary trends are examined in the light of adopting different base years, in particular the time frame's mid- and end- points (1950 and 2010). It will discuss the scope of variation between the different base years' index values and identify the specific underlying causes and effects of this pattern. In particular, it will show how although the trends at the indicator level remain the same, the relative size of these indicators to each other can change from one base year to another. This in turn can lead to variation at the overall index level.

The first major observation is that the overall trends are the same irrespective of what base year is adopted as they all show an increase in stringency over time. However, the trends vary strongly in terms of magnitude. The absolute index scores are lower the later the base year. For example, the UK has seen increases from 2.66 to 24.01 (for the 1880 base year); 1.86 to 7.11 (for the 1950 base year) and 1.03 to 4.62 (for the 2010 base year). The smaller 1880 base year emphasise the jumps in the expansion of protection compared to the 1950 and especially 2010 ones.

[195] The data is available in the spreadsheet labelled 'base year annex'.
[196] For more details, please see section 6.4.1 Normalization and Aggregation.
[197] For more details, please see chapter 6 on Stringency and in particular 6.4.1 Normalization and Aggregation.

This effect is most clearly visible for key reforms, as the example of Germany shows. Here, the scope of protection was strongly enhanced by the 1901/1907 reforms- visible in the data in 1910. From the 1880 view point, the increase is from 2.9 to 16.06. In comparison, the magnitude of change is less for the 1950 base year (only 2.46 to 4.3) and even more so from the 2010 angle (1.25 to 2.52). The explanation lies in the frame of reference and therefore the perception of change. The level of stringency has increased over time. As a result, taking the average provisions for a later point of time will provide a higher base year average. As the base year average increases, the index value for the indicator becomes smaller because the standardisation requires that the indicator value is divided by the base year average.[198] Therefore, the higher the base year average, the smaller is the index value.

However, the relative rate of change varies across the case studies. Looking for example at the International Level, the 1880 base year shows an overall increase of 1632% (from 1.64 to 28.44); 574% for the 1950 base year (from 1.28 to 8.64) and 293% for the 2010 base year (from 0.96 to 3.76). The relative change is therefore increasingly declining for the later base years. The same pattern is also visible for the US where the relative increases are 1936%, 394% and 339%. Germany and the UK, on the other hand, have the lowest rate of increase for the 1950 base year while 1880 has the highest, followed by the 2010 one. For example, Germany has seen respective increases of 542%; 105% and 253% while the UK has experienced change of magnitude of 803%, 282% and 347%. In these cases then, although the magnitude of the index value is smaller, the relative change is the least extensive in 1950 rather than 2010.

[198] For more detail on the Laspeyres index, please see section 6.1 Methodology: Laspeyres Index.

The reason for this pattern is the relative size of the components to each other. The overall index score is a combination of the individual indicators' index scores. As a result, their relative influence depends on their absolute size in comparison to each other. However, each indicator is independently calculated which means that its value is divided by its own base year value. As a result, it is possible that the actual index values can rise/ fall more strongly in some indicators than in others. This in turn means that some components gain more comparative influence than they would have if a different base year was adopted.

To illustrate this, the example of Germany will be used here. The Threshold of protection in 1880 using the 1880 base year has an index value of 0.65. Utilizing the 2010 base year however shows that the Threshold of Protection is 0. The difference is caused by a single indicator: the number of formalities. The 1880 base year converts the absolute number of exemptions from 3 to an index value of 0.65 (1880 base year average is 3.33). In comparison to this, the 2010 average is only 1.33 which in turn translates the number of formalities into an index score of 2.25 and therefore significantly higher. In essence, the existence of 3 formalities in 1880 is emphasised in the 2010 base year compared to the 1880 one because formalities are less common in 2010 than they were in 1880. As a result, their relative importance (as reflected in the index value for this area of copyright stringency: Threshold of Protection) has increased. In summary, the relative size of individual components to each other explains differences in the relative magnitude of change.

It should be noted that this effect is especially strong for the exemptions. In particular, the effect of exemptions as balancing the increases in copyright owners'

enhanced protection is weaker for later base years. 2010 has significantly higher number of exemptions for all work types which in turn increases the base year value. For example, for copyright works, the base year has increased from 7 in 1880, to 15.67 in 1950 and 38.67 in 2010. Unsurprisingly, the index value of the exemptions has fallen accordingly. In the UK in 1880, the value has fallen from 0.43 (1880 base year), to 0.19 (1950 base year) and 0.08 (2010 base year). Looking at the 2010 time point in comparison, the values are also significantly lower: 5.14, 2.3 and 0.93 respectively. Therefore, the 1880 emphasises and the 2010 base year strongly de- emphasises the role of exemptions in copyright policy, exactly because the number of exemptions has increased so strongly over time.

Despite this change in emphasis, the actual evolutionary patterns are largely identical for all case studies. The International Level has not seen any variation in trends the stringency levels rise and fall at the same moments in time, irrespective of which base year is used. However, in a small number of instances, the direction of evolution varies between base years. Germany's data exhibits the most pronounced variation of all case studies. In particular, the 1970 and 1980 time points differ. In 1970, the 1880 trend indicates a fall in the scope of protection by 30% while the other ones have seen increases of 48% and 47% for 1950 and 2010 respectively.[199] A look at the index' sub- level reveals that the only area where different trends are identifiable is the Protection of Moral Rights. Here, the 1880 trend has seen a slight fall in protection from 1.02 to 0.96 (-6%) while the 1950 base year has seen a minor increase (+2%) (from 1.16 to 1.18) and the 2010 one shows a doubling of the scope from 0.46 to 0.76

[199] The 1880 base year stringency index increases falls from 19.49 to 13.66 while the 1950 and 2010 both increase (from 3.94 to 5.85 and from 3.6 to 3.83 respectively).

(+100%). By 1980, the variation in index level trends is still observable but significantly smaller. The scope of protection continues to fall for the 1880 base line (-2% as the scores drop from 13.66 to 13.38) while they continue to increase for the 1950 (from 5.85 to 6.14) and 2010 trends lines (from 3.83 to 3.9).

However, the key observation is that the trends at the individual indicator levels do not vary. In particular, the number of moral rights, their term and the exemptions which apply have all increased to the same extent (67%, 167% and 133% respectively) while the number of sanctions has not seen any change at all. Therefore, while the relative size of the indicators to each other has been influenced by the change in base year, the actual direction of change and its relative strength at the indicator level have not. This is not surprising given that the base year is stable for each indicator and the underlying data as such is not affected. This in turn means that increases are the same across base years despite the change in the actual index value. This stability at the indicator level's trends is essential for the actual way the analysis was conducted. In the thesis' main body, causes were identified by relying on the specific indicator in combination to the secondary literature. Because the trends at the indicators' level are not affected by the different base years, neither are the causal conclusions drawn from them.

The same phenomenon is also present in the case of the UK and the US. The UK has seen a variation in trends between in 1980 and 1990. For the 1980 variation, the stringency levels increase for the 1880 and 1950 base lines (from 27.95 to 28.28 and from 8.67 to 8.75 respectively). However, from a 2010 view point, the level of stringency has fallen from 3.49 to 3.39. Despite this, the indicator level only varies for

the Threshold of Protection. It shows no change for 1880 base year but small increases for 1950 and 2010 base year trends.[200] It should be noted though that the indictors used to calculate this stringency area actually show the same evolutionary patterns.

The second instance of varying trends in the UK is 1990. Here, the 1880 and 1950 base lines both fall (from 28.28 to 23.18 and 8.75 to 6.73 respectively) while the 2010 one increases (from 3.39 to 4.07). The area causing this variation is Protection of Copyrighted Works. As before, there has been no change from an 1880 perspective (0.57) while both the 1950 and 2010 lines have seen rising stringency levels (from 0.59 to 0.66 and from 0.47 to 0.54). But again, all indicators used in the calculation show the same evolutionary pattern. As the UK example shows, variation in the overall index level does not mean that the trends at the actual indicator level have been affected. Rather, it is the relative size of the components to each other accounting for the difference.

For the US, the only difference in evolutionary patterns is in 2010 where trends based on the 1880 and 1950 base years show a decline in stringency while the 2010 one increases. The 1880 base year indicates a fall from 38.49 to 37.92 and the 1950 base year a decline from 7.01 to 6.93. At the same time, the 2010 base year reports an increase of 4.06 to 4.16. However, a closer look at the indicators clarifies that they have all increased and fallen at the same time. Therefore, the trends at the specific indicator level are identical as they have been in the previous instances.

In conclusion, choosing different base years does have some influence on the overall trends but not the indicators as such. The later the base year is in the time

[200] The 1880 trend is stable at 0.57 while the 1950 one increases from 0.58 to 0.59 and the 2010 one rises from 0.46 to 0.47.

frame, the higher is the base year average which in turn reduces the magnitude of change. In addition, the specific way a Laspeyres index works with each indicator being calculated independently has the effect of possible changes in the relative size of indicators to each other. This in turn can lead to differences at the overall index level and relative extent of change over time. Having said this, these instances are very rare (5 out of 56 time comparison points, each being based on 24 specific indicators). However, the process tracing approach adopted in this thesis to identify causality is not affected because the indicators all show the same trend. Finally, it should be noted that one of the key rules of analysing Laspeyres' Indices is that they can never be compared across different base years (C. Feinstein et al. 2002: 510- 513). In this light, the issues identified here are not data related as such but are a well- known part of the methodology itself.

Appendix 4: Glossary of Abbreviations

This glossary provides explanations for all the abbreviations used in the thesis as well as the related data.

Abbreviation	Explanation
AR	Author Rights system
Base year 1880	This is the average strength of provisions in 1880, drawn from Germany, the US and the UK
CL	Common Law Copyright system
CR	Copyright works
CV	Coefficient of Variation
E	Explicitly exempt
ER	Economic rights
EW	Economic Works which refers to the combined protection of copyright works, neighbouring rights and performers
EX	Exemptions
EX average	Number of average conditions that apply to an exemptions
EX: CR	Number of exemptions which apply to copyright works
EX: ER (Numeration)	Number of exemptions with a remuneration condition
EX: ER (Non- commercial)	Number of exemptions with a non-commercial use condition
EX: ER (Compensation)	Number of exemptions with a compensation for the author/ rights owner condition
EX: MR	Number of exemptions that apply to moral rights
EX: NR	Number of exemptions that apply to neighbouring rights
EX: Performer	Number of exemption that apply to performers
Formality	Number of formalities
Index	The index scores, calculated by dividing the numerical values by the base year.
Index (1880)	Tab showing the calculation of the index with the base year 1880
NR	Neighbouring rights
MR	Moral rights
P	Partial
SEM	Single European Market
Term	Term of protection

Table 48: Summary of abbreviations used in the data spreadsheets.

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US Copyright Law Amendment History

Year	*Name of the Amending Law*	*Common Name of the Law*	*Reference*
1870		Copyright Act	16 Stat. 198
1874		Copyright Amendment	18 Stat. 78
1879		Post Office Amendment Act, Act of March 3, 1879, 55th Cong., 3d Sess., 20 Stat. 359.	20 Stat. 259, 359
1882		Copyright Amendment Act	22 Stat. 181
1891		International Copyright Act (Chace Act)	26 Stat. 1106
1895		Printing Law	28 Stat. 608
1895		Copyright Amendment Act	28 Stat. 965
1897		Copyright (Musical Performance of Musical Compositions) Act	
1897		Copyright Amendment Act	29 Stat. 694
1909		Copyright Act	35 Stat. 1075
1912	Public Law 62-303		37 Stat. 488
1913	Public Law 62-405		37 Stat. 724
1914	Public Law 63-78		38 Stat. 311
1919	Public Law 66-102		41 Stat 368
1926	Public Law 69-464		44 Stat. 818
1928	Public Law 70-478		45 Stat. 713
1938	Public Law 75-421		52 Stat. 6
1939	Public Law 76-244		53 Stat.1142
1940	Public Law 76-434		54 Stat. 51

Year	*Name of the Amending Law*	*Common Name of the Law*	*Reference*
1940	Public Law 76-450		54 Stat. 106
1941	Public Law 77-258		55 Stat. 106
1947	Public Law 80-281	Copyright Act	61 Stat. 652
1948	Public Law 80-501		62 Stat. 869, 1009
1948	Public Law 80-773		62 Stat. 202
1949	Public Law 81-84		63 Stat. 153
1951	Public Law 82-248		65 Stat. 710, 717
1952	Public Law 82-575		66 Stat. 752
1954	Public Law 83-331		68 Stat. 52
1954	Public Law 83-743		68 Stat.1030
1956	Public Law 84-452		70 Stat. 63
1957	Public Law 85-313		71 Stat. 633
1962	Public Law 87-646		76 Stat. 442, 446
1962	Public Law 87-668		76 Stat. 555
1962	Public Law 87-846		76 Stat. 1107, 1116
1965	Public Law 89-142		79 Stat. 581
1965	Public Law 89-297		79 Stat. 1072
1967	Public Law 90-141		81 Stat. 464
1968	Public Law 90-416		82 Stat. 397
1969	Public Law 91-147		83 Stat. 360
1970	Public Law 91-555		84 Stat. 1441

Year	*Name of the Amending Law*	*Common Name of the Law*	*Reference*
1971	Private Law 92-60		85 Stat. 857
1971	Public Law 92-140		85 Stat. 391
1971	Public Law 92-170		85 Stat. 490
1972	Public Law 92-566		86 Stat. 1181
1974	Public Law 93-573		88 Stat. 1873
1976	Public Law 94-553	Copyright Act	90 Stat. 2541
1978	Public Law 95-598		92 Stat. 2549
1978	Public Law 95-94	Legislative Branch Appropriation Act	91 Stat. 653
1980	Public Law 96-517		94 Stat. 3015
1982	Public Law 97-180	Piracy and Counterfeiting Amendments Act	96 Stat. 91
1982	Public Law 97-215		96 Stat. 178
1982	Public Law 97-366		96 Stat. 1759
1984	Public Law 98-450	Record Rental Amendment	98 Stat. 1727
1984	Public Law 98-620	Semiconductor Chip Protection Act	98 Stat. 3335, 3347
1986	Public Law 99-397		100 Stat. 848
1987	Public Law 100-159		101 Stat. 899
1988	Public Law 100-568	Berne Convention Implementation Act	102 Stat. 2853
1988	Public Law 100-617		102 Stat. 3194
1988	Public Law 100-667	Satellite Home Viewer Act	102 Stat. 3935
1988	Public Law 100-702	Judicial Improvements and Access to Justice Act	102 Stat. 4642, 4672

Year	*Name of the Amending Law*	*Common Name of the Law*	*Reference*
1990	Public Law 101-318	Copyright Fees and Technical Amendments Act	104 Stat. 287
1990	Public Law 101-319	Copyright Royalty Tribunal Reform and Miscellaneous Pay Act	104 Stat. 290
1990	Public Law 101-553	Copyright Remedy Clarification Act	104 Stat. 2749
1990	Public Law 101-650	Visual Artists Rights Act	104 Stat. 5089
1990	Public Law 101-650	Architectural Works Copyright Protection Act	104 Stat. 5089, 5133
1990	Public Law 101-650	Computer Software Rental Amendments Act	104 Stat. 5089, 5134
1991	Public Law 102-64	Semiconductor International Protection Extension Act	105 Stat. 320
1992	Public Law 102-307	Copyright Amendments Act	106 Stat. 264
1992	Public Law 102-307	Copyright Renewal Act	106 Stat. 264
1992	Public Law 102-492		106 Stat. 3145
1992	Public Law 102-561		106 Stat 4233
1992	Public Law 102-563	Audio Home Recording Act	106 Stat. 4237
1993	Public Law 103-182	North American Free Trade Agreement Implementation Act	107 Stat. 2057, 2114 and 2115
1993	Public Law 103-198	Copyright Royalty Tribunal Reform Act	107 Stat. 2304
1994	Public Law 103-369	Satellite Home Viewer Act	108 Stat. 3477
1994	Public Law 103-465	Uruguay Round Agreements Act	108 Stat. 4809, 4973

Year	*Name of the Amending Law*	*Common Name of the Law*	*Reference*
1995	Public Law 104-39	Digital Performance Right in Sound Recordings Act	109 Stat. 336
1996	Public Law 104-153	Anti-counterfeiting Consumer Protection Act	110 Stat. 1386, 1388
1996	Public Law 104-197	Legislative Branch Appropriations Act	110 Stat. 2394
1997	Public Law 105-147	No Electronic Theft (NET) Act	111 Stat. 2678
1997	Public Law 105-80		111 Stat. 1529
1998	Public Law 105-298	Sonny Bono Copyright Term Extension Act	112 Stat. 2827
1998	Public Law 105-298	Fairness in Music Licensing Act	112 Stat. 2827, 2830
1998	Public Law 105-304	Computer Maintenance Competition Assurance Act	112 Stat. 2860, 2886
1998	Public Law 105-304	Digital Millennium Copyright Act	112 Stat. 2860, 2887
1998	Public Law 105-304	Online Copyright Infringement Liability Limitation Act	112 Stat. 2860, 2877
1998	Public Law 105-304	WIPO Copyright and Performances and Phonograms Treaties Implementation Act	112 Stat. 2860, 2861
1998	Public Law 107-273	Technology, Education, and Copyright Harmonization Act	116 Stat. 1758, 1910
1999	Public Law 106-113	Satellite Home Viewer Improvement Act	113 Stat. 1501
1999	Public Law 106-160	Digital Theft Deterrence and Copyright Damages Improvement Act	113 Stat. 1774

Year	*Name of the Amending Law*	*Common Name of the Law*	*Reference*
2000	Public Law 106-379	Work Made for Hire and Copyright Corrections Act	114 Stat. 1444
2002	Public Law 107-273	Intellectual Property and High Technology Technical Amendments Act	116 Stat. 1758
2002	Public Law 107-321	Small Webcaster Settlement Act	116 Stat. 2780
2004	Public Law 108-419	Copyright Royalty and Distribution Reform Act	118 Stat. 2341
2004	Public Law 108-446	Individuals with Disabilities Education Improvement Act	118 Stat. 2647, 2807
2004	Public Law 108-447	Satellite Home Viewer Extension and Reauthorization Act	118 Stat. 2809, 3393
2004	Public Law 108-482	Anti- counterfeiting Amendments Act	118 Stat. 3912
2004	Public Law 108-482	Fraudulent Online Identity Sanctions Act	118 Stat. 3912, 3916
2004	Public Law 108-482	Intellectual Property Protection and Courts Amendments Act	
2005	Public Law 109-9	Artists' Rights and Theft Prevention Act	119 Stat. 2128
2005	Public Law 109-9	Family Movie Act	119 Stat. 218, 223
2005	Public Law 109-9	Preservation of Orphan Works Act	119 Stat 218, 226
2006	Public Law 109-303	Copyright Royalty Judges Program Technical Corrections Act	120 Stat. 1478
2008	Public Law 110-403	Prioritizing Resources and Organization for Intellectual Property Act	122 Stat. 4526
2008	Public Law 110-435	Webcaster Settlement Act	122 Stat. 4974
2009	Public Law 111-36	Webcaster Settlement Act	123 Stat. 1926

Year	*Name of the Amending Law*	*Common Name of the Law*	*Reference*
2010	Public Law 111-118	Department of Defense Appropriations Act	123 Stat. 3409
2010	Public Law 111-144	Temporary Extension Act	124 Stat. 42
2010	Public Law 111-157	Satellite Extension Act	124 Stat. 1116
2010	Public Law 111-175	Satellite Extension and Localism Act	124 Stat. 1218
2010	Public Law 111-295	Copyright Cleanup, Clarification and Corrections Act	124 Stat. 3180

UK Copyright Law Amendment History

Year	*Name of the Amending Law*	*Reference*
1735	Engravers Act	8 Geo. II, c. 13
1766	Engravers Amendment Act	7 Geo. III, c. 38
1775	University Copyright Act	15 Geo. III, c. 53
1798	Models and Busts Acts	38 Geo. III, c. 71
1814	Sculptures Act	54 Geo.III, c.56
1833	Dramatic Literature Act	3 & 4 Will.IV, c.15
1835	Publication of Lectures Act	5 & 6 Will.IV, c.65
1842	Copyright Act	5 & 6 Vict., c.45
1844	International Copyright Act	7 & 8 Vict., c.12
1852	International Copyright Act	15 & 16 Vict., c.12
1862	Fine Arts Copyright Act	25 & 26 Vict., c.68
1882	Copyright (Musical Compositions) Act	45 & 46 Vict., c. 40
1886	International Copyright Act	49 & 50 Vict., c.33
1888	Copyright (Musical Compositions) Act	51 & 52 Vict. c.17
1902	Musical (Summary Proceedings) Copyright Act	2 Edw. VII, c. 15
1906	Musical Copyright Act	6 Edw. VII, c. 36
1911	Copyright Act	1 & 2 Geo. V, c. 46
1925	Dramatic and Musical Performers Act	15 & 16 Geo. V, c. 46
1956	Copyright Act	1956 c.74
1958	Performers Act	1958 c. 44

Year	*Name of the Amending Law*	*Reference*
1963	Performers Act	1963 c.53
1972	Performers' Protection Act	1972 c. 32
1979	Public Lending Right	1979 c. 10
1988	Competition Act 1998	1998 c. 41
1988	Copyright, Designs and Patents Act	1988 c. 48
1988	Criminal Justice Act 1988	1988 c. 33
1989	Design Right (Semiconductor Topographies) Regulations	1989/1100
1990	Broadcasting Act	1990 c. 42
1995	Duration of Copyright and Rights in Performances Regulations	1995 No. 3297
1996	Broadcasting Act 1996	1996 c. 55
1996	Copyright and Related Rights Regulations	1996 No. 2967
1996	Copyright and Related Rights Regulations	1996 No. 2967
1996	Defamation Act	1996 c. 31
1997	Copyright and Rights in Databases Regulations	1997 No. 3032
2002	British Overseas Territories Act	2002 c. 8
2002	Copyright, etc. and Trade Marks (Offences and Enforcement) Act	2002 c. 25
2002	Copyright (Visually Impaired Persons) Act	2002 c. 33
2002	Enterprise Act	2002 c. 40
2003	Communications Act	2003 c. 21
2003	Electronic Commerce (EC Directive) (Extension) (No. 2) Regulations	2003 No. 2500
2003	Health and Social Care (Community Health and Standards) Act	2003 c. 43

Year	*Name of the Amending Law*	*Reference*
2003	Legal Deposit Libraries Act	2003 c. 28
2003	The Copyright and Related Rights Regulations	2003 No. 2498
2004	The Goods Infringing Intellectual Property Rights (Customs) Regulations	2004 No. 1473
2005	Commissioners for Revenue and Customs Act	2005 c. 11
2005	Constitutional Reform Act	2005 c. 4
2005	Income Tax (Trading and Other Income) Act	2005 c. 5
2005	Serious Organised Crime and Police Act	2005 c. 15
2006	Government of Wales Act	2006 c. 32
2006	National Health Service (Consequential Provisions) Act	2006 c. 43
2006	The Intellectual Property (Enforcement, etc.) Regulations	2006 No. 1028
2006	The Performances (Moral Rights, etc.) Regulations	2006 No. 18
2006	Violent Crime Reduction Act	2006 c. 38
2006	Wireless Telegraphy Act	2006 c. 36
2007	Legal Services Act	2007 c. 29
2007	Tribunals, Courts and Enforcement Act	2007 c. 15
2009	The Audiovisual Media Services Regulations	2009 No. 2979
2010	Digital Economy Act	2010 c. 24
2010	The Copyright, Designs and Patents Act 1988 (Amendment) Regulations	2010 No. 2694

German Copyright Law Amendment History

Year	*Name of the Amending Law*	*Common Name of the Law*	*Reference*
1870	Gesetz betreffend das Urheberrecht an Schriftwerken, Abbildungen, Kompositionen und dramatischen Werken		1870 R.B.G.l 339
1876	Gesetz betreffend das Urheberrecht an Werken der bildenden Künste		1876 R.B.G.l 4
1901	Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst	LUG	1901 R.B.G.l 227
1907	Gesetz betreffend das Urheberrecht an an Werken der bildenden Künste und der Photographie	KUG	1907 R.B.G.l 7
1910	Gesetz zur Ausführung der revidierten Berner Übereinkunft zum Schutze von Werken der Literatur und Kunst		1910 R.B.G.l 739
1935	Gesetz zur Verlängerung der Schutzkritierien im Urheberrecht		1934 R.B.G.l II 359
1940	Gesetz zur Verlängerung der Schutzfristen für das Urheberrecht an Lichtbildern		1940 R.B.G.l 758
1965	Gesetz über das Urheberrecht und verwandte Schutzrechte	UrhG	1965, B.G.B.l, no. 51, p. 1273
1970	Gesetz zur Änderung von Kostenermächtigungen, sozialversicherungsrechtlichen und anderen		1970, B.G.B.l, no. 58, p. 805
1972	Gesetz zur Änderung des Urheberrechts		1972, B.G.B.l, no. 120, p. 2081
1973	Gesetz zu den am 24. Juli 1971 in Paris unterzeichneten Übereinkünften auf dem Gebiet des		1973 B.G.B.l II, no. 44, p. 1069

Year	*Name of the Amending Law*	*Common Name of the Law*	*Reference*
1974	Bekanntmachung über das Inkrafttreten der Pariser Fassung der Berner Übereinkunft zum Schutz von Werken der Literatur und Kunst		1974, B.G.B.l II, no. 45, p. 1079
1974	Einführungsgesetz zum Strafgesetzbuch		1974, B.G.B.l, no. 22, p. 469
1985	Gesetz zur Änderung von Vorschriften auf dem Gebiet des Urheberrechts		1985, B.G.B.l, no. 33, p. 1137
1986	1. Gesetz zur Verbesserung der Stellung des Verletzten im Strafverfahren	Opferschutzgesetz	1986, B.G.B.l, no. 68, p. 2496
1990	Gesetz zur Stärkung des Schutzes des geistigen Eigentums und zur Bekämpfung der Produktpiraterie		1990, B.G.B.l, no. 10, p. 422
1993	2. Gesetz zur Änderung des Urheberrechts		1993, B.G.B.l, no. 29, p. 910
1993	Bekanntmachung über das Inkrafttreten des EWR-Ausführungsgesetzes sowie des Anpassungsgesetzes zum EWR- Ausführungsgesetz		1993, B.G.B.l, no. 73, p. 2436
1993	Gesetz zur Anpassung des EWR- Ausführungsgesetzes		1993, B.G.B.l, no. 52, 1666
1994	Gesetz zur Änderung des Patentgebührengesetzes und anderer Gesetze		1994, B.G.B.l, no. 48, p. 1739
1994	Gesetz zur Neuordnung des Berufsrechts der Rechtsanwälte und der Patentanwälte		1994, B.G.B.l, no. 59, p. 2278

Year	*Name of the Amending Law*	*Common Name of the Law*	*Reference*
1994	Gesetz zur Reform des Markenrechts und zur Umsetzung der Ersten Richtlinie 89/104/EWG des Rates vom 21. Dezember 1988 zur Angleichung der Rechtsvorschriften der Mitgliedsstaaten über die Marken	Markenrechtsreformgesetz	1994, B.G.B.l, no. 74, p. 3082
1995	3. Gesetz zur Änderung des Urheberrechtsgesetzes		1995, B.G.B.l, no. 32, p. 842
1996	Markenrechtsänderungsgesetz		1996, B.G.B.l, no. 52, p. 1870
1997	Gesetz zur Regelung der Rahmenbedingungen für Informations- und Kommunikationsdienste	Informations- und Kommunikationsdienstegesetz	1997, B.G.B.l, no. 52, p. 1870
1998	2. Gesetz zur Änderung des Patentgesetzes und anderer Gesetze		1998, B.G.B.l, no. 45, p. 1827
1998	4. Gesetz zur Änderung des Urheberrechts		1998, B.G.B.l, no. 27, p. 902
2000	Gesetz zur Vergleichenden Werbung und Änderung wettbewerbsrechtlicher Vorschriften		2000, B.G.B.l, no. 42, p. 1374
2001	Gesetz zur Bereinigung von Kostenregulungen auf dem Gebiet des geistigen Eigentums		2001, B.G.B.l, no. 69, p. 3656
2001	Gesetz zur Modernisierung des Schuldrechts		2001, B.G.B.l, no. 61, p. 3138

2002	Gesetz zur Änderung des Rechts der Vertretung durch Rechtsanwälte vor den Oberlandesgerichten	OLG Vertretungsänderungsgesetz	2002, B.G.B.l, no. 53, p. 2850
2002	Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern		2002, B.G.B.l, no. 21, p. 1155
2003	Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft		2003, B.G.B.l, no. 46, p. 312
2006	5. Gesetz zur Änderung des Urheberrechtsgesetzes		2006, B.G.B.l, no. 46, p. 1774
2007	2. Gesetz zur Änderung des Finanzverwaltungsgesetzes und anderer Gestze		2007, B.G.B.l, no. 65, p. 2897
2007	2. Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft		2007, B.G.B.l, no. 52, p. 2513
2008	6. Gesetz zur Änderung des Urheberrechtsgesetzes		2008 B.G.B.l , no. 56, p. 2349
2008	Gesetz zur Reform des Verfahrens in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit	FGG- Reformgesetz- FGG-RG	2008 B.G.B.l, no. 61, p. 2586
2008	Gesetz zur Verbesserung der Durchsetzung von Rechten des geistigen Eigentums		2008, B.G.B.l, no. 48, p. 2070

EU Copyright Law Amendment History

Year	*Name of the Amending Law*	*Common Name of the Law*	*Reference*
1991	Directive on the legal protection of computer programs	Computer Programs Directive	(91/250/EEC)
1992	Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual	Rental Rights Directive	(92/100/EEC)
1993	Directive on harmonizing the term of protection of copyright and certain related rights	Term Harmonization Directive	(93/98/EEC)
1996	Directive on the legal protection of databases	Database Directive	(96/9/EC)
2000	Charter of Fundamental Rights of the European Union	EU Fundamental Rights Charter	(2000/C 364/01)
2001	Directive on the harmonisation of certain aspects of copyright and related rights in the information society	Information Society (InfoSoc)	(2001/29/EC)
2001	Directive on the resale right for the benefit of the author of an original work of art	Resale Right Directive	(2001/84/EC)
2004	Directive on the enforcement of intellectual property rights	Enforcement Directive	(2004/48/EC)
2006	Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version)	Rental Rights Directive	(2006/115/EC)
2006	Directive on the term of protection of copyright and certain related rights (codified version)	Term Harmonization Directive	(2006/116/EC)
2009	Directive on the legal protection of computer programs (codified version)	Computer Programs Directive	2009/24/EC)

International Level Copyright Law Amendment History

Year	*Name of the Amending Law*	*Common Name of the Law*
1886	Convention Concerning the Creation of An International Union for the Protection of Literary and Artistic Works	Berne Convention
1896	Additional Act Amending Articles 2, 3, 5, 7, 12, and 20, of the Convention of September 9, 1886, and Number 1 and 4 of the Final Protocol Annexed Thereto	Paris Additional Act and Interpretative Declaration
1908	Revised Berne Convention for the Protection of Literary and Artistic Works	Berlin Act
1914	Additional Protocol to the Revised Berne Convention of November 13, 1908	Berne Additional Protocol
1928	International Convention for the Protection of Literary and Artistic Works	Rome Act
1948	Berne Convention for the Protection of Literary and Artistic Works	Brussels Act
1952	Universal Copyright Convention	UCC
1961	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations	Rome Convention
1967	Berne Convention for the Protection of Literary and Artistic Works	Stockholm Act
1971	Berne Convention for the Protection of Literary and Artistic Works	Paris Act
1971	Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms	Geneva Convention

Year	*Name of the Amending Law*	*Common Name of the Law*
1971	Universal Copyright Convention as revised at Paris 24 July 1971, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI 1971	UCC
1979	Amendment to Berne Convention for the Protection of Literary and Artistic Works	Paris Act
1994	Trade- related Aspects of Intellectual Property Rights	TRIPs
1996	WIPO Copyright Treaty	WCT
1996	WIPO Performances and Phonograms Treaty	WPPT

Case Law

Country	*Year*	*Reference*	*Case Name (if listed)*
EU	1981	cases C-55/80 and 57/80	Musik Vertrieb Membran v Gema
EU	1982	case C- 262/81	Coditel
EU	1988	case C- 158/86	Warner Brothers v Erik Viuff Christiansen
EU	1989	case C- 341/87	EMI v Patricia
EU	1989	case C- 341/87	Emi v Patricia and Others
EU	1993	cases 92 C-92/92 and C-326/92	Phil Collins and Others
EU	1998	case C- 200/96	Metronome Musik
EU	2004	case C- 203/02	British Horse Racing Board
EU	2004	case C- 444/02	Fixtures Marketing I
Germany	1971	I BvR 765/66, Bundesgesetzblatt Teil I No. 112 (12/11/1971)	
Germany	1971	I BvR 766/66, Bundesgesetzblatt Teil I 1971 No. 124 (9/12/1971)	
Germany	1978	I BvR 352/71, Bundesgesetzblatt Teil I, No. 11 (6/3/1979)	
Germany	1884	1884 RGZ 12, 50	
Germany	1887	1887 RGZ 18, 150	
Germany	1895	1895 RGZ 34, 104	
Germany	1898	1898 RGZ 41, 43	
Germany	1908	1908 RGZ 69, 242	
Germany	1909	1909 RGZ 70, 266	
Germany	1912	1912 RGZ 79, 397	
Germany	1913	1913 RGZ 82, 333	
Germany	1922	1922 RGZ 105, 160	
Germany	1924	1924 RGZ 108, 62	
Germany	1926	1926 RGZ 113, 413	
Germany	1928	1928 RGZ 121, 357	
Germany	1929	1929 RGZ 123, 312	

Country	*Year*	*Reference*	*Case Name (if listed)*
Germany	1932	1932 RGZ 136, 377	
Germany	1933	1933 RGZ 140, 137	
Germany	1933	1933 RGZ 141, 231	
Germany	1956	1956 BGHZ MDR 1956/42, 1553	Nichtöffentliche Musikdarbietung
Germany	1956	1956 BGH MDR/42, 1552	Recht am eigenen Bilde
Germany	1958	1958 BGH MDR 1959/4, 276- 7	Fahrscheinformular
Germany	1958	1958 BGHZ MDR 1958/10, 749	Mecki Igel
Germany	1959	1959 BGH MDR 1960/5, 375-6	Orientteppich
Germany	1960	1960 BGH MDR 5/1960, 376	Werbung für Tonbandgeräte
Germany	1971	case 78/70	Deutsche Grammophone Gesellschaft v Metro
Germany	1971	1971 BGH NJW, 1971 # 48, 2169-2173	Disney Parodie
Germany	1972	1972 BGH MDR 1973/1, 33	Handbuch moderner Zitate
Germany	1974	1974 BGH MDR 1974/7, 557- 8	Hummelrechte
Germany	1980	1980 BGH MDR 1981/8, 641-2	Dirlada I
Germany	1993	1993 BGH MDR 1994/2, 155	
Germany	1994	1994 BGH MDR 1994/11, 1103	
Germany	1995	1995 BGH MDR 1996/4, 365	
Germany	1998	1998 BGH MDR 1997/2, 157-8	
Germany	1998	1996 BGH, 10.12.1998 - I ZR 100/96	Elektronische Pressearchive
Germany	1999	1999 BGH, 25.02.1999 - I ZR 118/96	Kopienversanddienst
Germany	2006	2006 BGH 5.10.2006 - I ZR 277/03	Kinsky Klaus
Germany	2008	2008 BGH, 17.07.2008 - I ZR 219/05	Clone CD
Germany	2010	2010 BGH, 19.05.2010 - I ZR 158/08	Markenheftchen
UK	1741	(1741) 2 Atk. 141	Gyles v Wilcox
UK	1741	(1741) 2 Atk. 342	Pope v Curl

Country	*Year*	*Reference*	*Case Name (if listed)*
UK	1774	Hansard, 1st ser., 17 (1774): 953-1003	Donaldson v Beckett
UK	1854	4 HLC 815	Jeffreys v Boosey
UK	1895	1985 2 Q.B 429	Fuller v Blackpool Winter Gardens
UK	1900	[1900] AC 539	Walter v Lane
US	1837	33 U.S. 591	Wheaton v Peters
US	1841	(C.C.D.Mass. 1841) (No. 4,901)	Folsom v Marsh
US	1880	101 U.S. 99	Baker v Selden
US	1884	111 U.S. 53	Burrow- Giles Lithographic Co. v Sarony
US	1903	188 U.S. 239	Bleistein v Donaldson Lithographing Company
US	1908	210 U.S. 339	Bobbs- Merill v Straus
US	1908	209 U.S. 1	White- Smith Music Publishing Cp. v Apollo Co.
US	1948	80 N.Y.S.2d575	Shostakovich v 20 th Century Fox Film Corp.
US	1954	347 U.S. 201, 219	Mazer v Stein
US	1964	329 F.2d 541	Irving berlin v E.C. Publishing
US	1973	487 F.2d 1345	Williams & Wilkins v US
US	1984	464 U.S. 417	Sony Corp. of America v Universal Studios, Inc.
US	1985	471 U.S. 539	Harper & Row v Nation Enterprises
US	1991	499 U.S. 340	Feist Publication v Rural Telephone Service
US	1991	780 F.Supp. 182	Grand Upright Music v Warner Bros. Records
US	1992	982 F.2d 693	Computer Associates International Inc v Altai Inc.
US	1993	991 F.2d 511	MAI Systems Corp. v Peak Computer, Inc
US	1994	510 U.S. 569	Campbell v Acuff- Rose Music, Inc.
US	2001	239 F.3d 1004	A & M Records v Napster
US	2001	171 F. Supp.2d 1075	SoftMan Products Co. v Adobe Systems, Inc.

List of Publications

S. Schroff 'The (Non) Convergence of Copyright Policies- A Quantitative Approach to Convergence in Copyright?' (accepted for publication subject to revisions by *Script-ed*) [a copy of this work is on the CD delivered with this thesis].

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