

Copyright, and the Production of Music

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INTRODUCTION: LEGAL FORM AND CULTURAL SYMBOL

Music, copyright, and information and communications studies

Writers in information and communication studies often assume the stability of objects under investigation: network nodes, databases, information. Legal writers in the intellectual property tradition often assume that cultural artefacts exist as objects prior to being governed by copyright law. Both assumptions are fallacious. This introduction conceptualises the relationship of legal form and cultural symbol. Starting from an understanding of copyright law as part of systems of production (in the sense of Peterson 1976), it is argued that copyright law constructs the artefacts it seeks to regulate as objects that can be bought and sold. In doing so, the legal and aesthetic logic of cultural symbols may clash, as in the case of digital music (the central focus of this special issue).

Keywords

Copyright; production of culture; aesthetics; logic of law; legal object; authorship

This special issue grew out of a seminar on intellectual property and the organization of cultural production that formed part of a seminar series on the cultural industries funded between 2003 and 2006 by the UK research councils AHRC and ESRC.¹ Broadly, the idea was to place intellectual property laws, and in particular copyright law, into a 'production of culture' perspective. The production of culture literature as developed by American sociologists during the 1970s (and first consolidated in a volume edited by Richard Peterson in 1976) is a loose family of empirically minded approaches that aim to trace how the symbolic elements of culture are shaped by their systems of production (usually understood widely to include technology, organizational structure, legal regulation).²

The production of culture perspective allows for a structural rather than a genius, aesthetical, ideological, cultural or social explanation of cultural transformation, while avoiding the pessimism of cultural objects as commodities in Adorno and Horkheimer's 'culture industry' analysis.³ Thus the emergence of the style of Impressionism may be due *not* to individual genius artists in a fracturing society but to a change in the structure of the Parisian art market, as bourgeois dealers and critics challenged the royal academy production system (White and White 1965). Similarly, the sudden emergence of Rock 'n' Roll between 1954 and 1956 may be explained from changes in studio technology and the regulation of the US radio spectrum that ended the monopolization of the means of production by major corporations (Peterson 1990).

The production of culture perspective can be fruitfully applied to copyright law. Griswold (1981) argues that the American copyright system of the nineteenth century (which only protected domestic authors while permitting the copying of foreign works) accounts for the emergence of the native 'man against nature' theme of the American novel, as novels of 'domestic manners' would be undercut by royalty free imports of that genre from Britain. This contrasts with a traditional literary explanation: differences in symbolic production were said to be the result of cultural differences – the new American novel reflecting the new American character. Griswold also claims that after the Copyright Act of 1909 which extended copyright to foreign authors, the divergence between American and European styles disappeared again, as American authors abandoned characteristic American themes.⁴

In the context of the current digital shift in information and communication technologies (central to the concerns of the readership of this journal), and persistent

¹ The series of 9 seminars was devised by Andy Pratt and Paul Jeffcutt. The seminar that gave rise to this special issue was hosted on 16 September 2005 by the Centre for Intellectual Property Policy & Management (www.cippm.org.uk) at Bournemouth University. Early versions of all papers were presented at that event.

² Initially, the perspective is almost untheoretical in that there is no prior exclusion on what could be seen as part of production systems. Thus culture producing systems may even include markets (Peterson 1982) or space (Pratt 2004; 2007).

³ According to Horkheimer and Adorno, the standardization of production in mass markets inevitably leads to a standardization of consumption ('The Culture Industry: Enlightenment as Mass Deception', in *Dialectic of Enlightenment* (2002 [1944])).

⁴ The International Copyright Act (Chace Act, 1891) had already removed the overt discrimination against foreign authors, but important formal obstacles remained that made it difficult for foreign authors and publishers to obtain effective protection in the US until 1909 (such as requirements that books had to be registered and manufactured in the US).

demands to reform copyright laws, there are considerable benefits from understanding copyright law as a sub-system within a production of culture perspective. To give a simple example:

If copyright law grants an exclusive right to make adaptations (as national copyright laws must under Article 12 of the Berne Convention which is integrated into the global free trading system under the 1994 WTO TRIPS Agreement), this will influence how artistic collaborations are structured, and what derivative works are being produced. When earlier creative materials are being re-used, permissions must be sought that can be refused, and creative discourse may have to be formalised at an early stage. *Public Enemy's* Hank Shoklee and Chuck D have described such an effect following their seminal Hip Hop album 'It Takes a Nation of Millions' (1988), constructed as a 'sonic wall' of digital samples.⁵ Once copyright through case law (i.e. decisions by judges in court cases) started to conceive of samples of other sound recordings as infringements, *Public Enemy* had to change their style (see further discussion in the paper of Kawohl and Kretschmer elsewhere in this special issue).

There are important insights to be gained here for legal scholars as well as for sociological and cultural researchers who engage with the production of culture perspective. For legal scholars, the perspective introduces an empirical dimension that opens the eyes for a fundamental evaluation: To what extent do developments in copyright law reflect or shape culture? Does copyright law follow its own logic? How should copyright law respond to the aesthetic practices it attempts to regulate?

Secondly, researchers in culture and media studies have predominantly focussed on 'every day practices', consumption, and in the digital context: piracy. Re-focussing on a production system that includes complex legal rules will move the debate forward. If rights are 'the currency in which all sectors of the industry trade' (Frith and Marshall 2004, 2), their role needs to be clearly articulated, not just referred to. This involves holding the tension between (i) music as an activity realised through complex communal mediations (Born, 2005), and (ii) the artist as an individualistic entrepreneur engaging in hard-nosed commercial relations.

Thirdly, setting copyright within the framework of cultural production also is revealing for the discipline of information and communication studies. As the debate will show, copyright constructs the legal objects it purports to regulate, thus the relationship is not easily understood as causal. This moves the debate away from the assumption that the objects routinely deployed in analysis can be assumed to be stable. These points are extended in the next section.

Music has become the locus for this interdisciplinary project because it was the first cultural industry to be exposed to the full forces of digitisation. 'Since music is easily personalised and transmitted, it also permeates many other services across cultural borders, anticipating social and economic trends' (Kretschmer et al. 2001, 414). A decade after the first MP3 files began to circulate on the Internet, and a decade after copyright law first attempted to pre-empt the perceived dangers of digitisation

⁵ 'How Copyright Law Changed Hip Hop: An Interview with Public Enemy's Chuck D and Hanks Shoklee', *Stay Free Magazine* (K. McLeod 2001; 2002).

through the WIPO Internet Treaties of 1996, the time is right for another survey of this landscape.⁶

The papers of this special issue approach the role of legal concepts in the explanation of creative production from a variety of disciplinary perspectives. As a legal scholar, Lionel Bently shows how UK copyright law requires the backward invention of the category ‘musical work’ into a creative practice that is oriented around performers and producers. Tuulikki Pietila reports a field study in South Africa that reveals the persistence of patronage structures in a changing technological and legal environment. Kawohl and Kretschmer map musicological ideas in a broad historical sweep on the underlying normative principles of copyright law. Cultural economist Peter Tschmuck contemplates the effects of a world without copyright on artist-publisher relations. Lastly, Klimis and Wallis place exclusive rights, back catalogues and P2P technology into the context of Schumpeterian entrepreneurship.

Common to all papers is an exploration of the law as an integral participant in the relationship of creators, producers and consumers, aiming to construct what can be bought and sold. Thus the debate progresses through detailed examinations of authorship, joint authorship, musical work, performance, ownership, contractual agreement, infringement, blanket licensing, merchandising – all in the recognisable empirical setting of the ‘celestial jukebox’ (Goldstein 2003 [1994]).

While these questions are under-researched (at least outside law), of particular interest to readers of this journal will be aspects that cut across the whole domain of information. The next two sections of this introduction therefore provide a broader canvass by reviewing a ‘black box’ fallacy that may be common to science and technology studies, and in a different way to intellectual property law. The first fallacy assumes that information and network nodes already exist, rather than being constructed through usage. The second fallacy assumes that copyright law regulates pre-existing objects. We show from the example of music that copyright law constitutes the objects it governs.

The object fallacy in information studies

Within the pages of this journal the general, although not exclusive, focus of concern has been expressed via a particular conception of information, namely one that is ‘black boxed’, or already formed (see MacKenzie and Wajcman, 1999). Thus, the major concern has been to address distributional matters: who is connected, or not;

⁶ An exclusive Internet right of ‘making available to the public’ was created (Article 8 WIPO Copyright Treaty; also Arts. 10 & 14 WIPO Performances and Phonograms Treaty), backed up by a provision protecting the technology that might protect the new exclusive right: circumvention of copy-protection measures (Article 11) and tampering with rights management information (Article 12, also Arts. 18 & 19 WIPO Performances and Phonograms Treaty) would become illegal, regardless of purpose and function. There is also a general clause on the ‘enforcement of rights’ which must be such as to ‘constitute a deterrent to further infringement’ (Art. 14; also Art. 23 WIPO Performances and Phonograms Treaty). The US and Europe have used these provisions to introduce draconian criminal sanction against infringements targeting not only commercial competitors but consumers. Digital copyright under this conception may be defined as the combination of (i) exclusive rights, (ii) technological locks and (iii) consumer sanctions (Kretschmer 2003).

who has access, or does not; who has the appropriate social skills, or not; who has the economic power, or not. Additionally, there is concern with various forms of surveillance commonly placed in the context of debates about the public sphere and liberty (Raab and Mason, 2002). These issues have been given momentum by the expansion of the technologies of surveillance and the possibility of cross-referencing digital information from multiple databases. Despite the critical questions of use and distribution that these studies pose, it is as if we have accepted the taxonomies and classifications of data collection agencies; once again, the 'content' is black boxed.

Running in parallel with these debates are those concerning technology and society. The central conceptual problem, the degree of autonomy one from the other, has shaped many debates. The most common versions explore some degree of the autonomy of technology and society via path-dependency or institutionalisation which shape long term transformations. An interesting intervention, and disruption, to these debates has come from the world of the Sociology of Scientific Knowledge (Bijker and Law, 1992; MacKenzie and Wajcman, 1999). The work of Callon, Woolgar and Latour (see Latour and Woolgar, 1986; Law, 1991; Woolgar, 1988) has been emblematic of a shift toward a co-constructivist agenda. Implicit in this work is a fulsome retort to the 'network' theories of Castells (1996). Network theories are configured through an articulation of nodes and flows; critically nodes are constructed *a priori*. Actor Network theorists have (literally) opened up the 'box' debate about what objects are, what relation they have to society. Particularly influential has been writing on the users of technologies; the central point being to disrupt determination or voluntarism (on either side) and argue instead for co-constitution and openness. The boundaries of objects are constituted through usage and incorporation; they never just 'are' but they are in constant struggle to 'fix' the boundaries and meanings (Latour, 1988, 1999).

So much is familiar to readers of this journal, however, the debate about the stability of objects in relation to Science and Technology Studies has only been taken up partially; there are plenty of debates about identity, but fewer about things. The radical intent of Actor-Network-Theory (ANT) is to unite the sociology of humans and non-humans (Latour, 1999). Looked at from this perspective the domain of intellectual property rights is a rich seam to mine. If one is concerned with what objects are, then recourse to the law seems to be one route way; however, and we would argue that this is an oversight of many of those in the sociology and communications studies community who point to the role of regulation or legal constraint, the law itself is a social process and it does not either have access to a privileged definition of things.

The musical object fallacy in copyright law

Law does not merely govern, it may constitute the objects it governs. This may involve the re-definition of a new technology so that it falls under an existing regulatory regime. For example, data transmission using telegraph technology was conceptualised as letters that should fall under the Postmaster General's monopoly (UK Telegraph Act 1869). More radically, the objects of regulation might not exist without the governing regime: Under the system of the Internet Corporation for Assigned Names and Number (ICANN), assigned unique identifiers constitute the

Internet. Thus regulation may evolve simultaneously, and at times at variance with the technologies and cultural symbols it seeks to turn into objects.

Our central issue is how the relationship between legal forms and cultural symbols should be conceptualised in the context of copyright law. During the last decade, a new orthodoxy has taken shape that explains the rise of author rights at the end of the eighteenth century from the emerging romantic notion of genius (Woodmansee 1984; Woodmansee and Jaszi's 1994; Boyle 1996). Key historical citations of the 'romantic author hypothesis' include Edward Young's *Conjectures on Original Composition* (1759) calling on his fellow writers to depart from received models and become originals (§43: 'An Original may be said to be of a vegetable nature; it rises spontaneously from the vital root of Genius; it grows, it is not made'); Le Chapelier's report introducing the 1791 French Revolutionary decree on the protection of dramatic works (*Loi relatif aux spectacles*): 'The most sacred, the most legislate, the most unassailable ... the most personal of properties, is a work which is the fruit of the imagination of a writer'⁷; and Johann Gottlieb Fichte's 1793 essay Proof of the Illegality of Reprinting (*Beweis der Unrechtmäßigkeit des Büchernachdrucks*) in which he derives proprietary authorship from a concept of characteristic inalienable form (see Kawohl & Kretschmer in this special issue). According to the 'romantic author hypothesis', modern copyright law followed the invention of authorship. Aesthetics came first: The romantic ideology of singular expressions of a unique persona gave rise to authorial rights that could be conceived analogous to 'real property', abandoning an earlier conception of copyright as 'a temporary, limited, utilitarian state grant' (Boyle 1996, 56).

In the context of music, Lydia Goehr has explicated the idealistic ontology of an abstract 'musical-work concept' as it formed at the end of the eighteenth century. A strict distinction between works (fixed with increasing precision), and performative interpretation began to regulate musical practice, and – says Goehr – set Western classical music on a path to *The Imaginary Museum of Musical Works* (the title of her influential 1992 book). Reusing themes and passages in different works of music, even by the same composer, was increasingly censored as derivative and unworthy. Changing notes in performance, or improvising over the written indicators of a score became a violation of a permanent work of art.

Goehr's application of this ontological shift to copyright law is brief, and not very convincing. Surprisingly, she concentrates on ownership rights seen 'as the product of a free person's labour', rather than on the appearance of the exclusive rights to public performance, and to make adaptations.⁸ In our context, the genealogy is revealing. In Goehr's account, again, the work concept came first, legal expressions followed.

⁷ 'La plus sacrée, la plus légitime, la plus inattaquable et, si je puis parler ainsi, la plus personnelle de toutes les propriétés, est l'ouvrage, fruit de la pensée d'un écrivain.' The report then suggests that the character of the property changes once a work is published, advancing towards a rather unromantic notion of a 'propriété du public'. This part of the report is much less known. Primary materials on the history of copyright are available on a new online database at the Centre for Intellectual Property and Information Law, Cambridge University (www.copyrighthistory.org).

⁸ 'When composers began to view their compositions as ends in themselves, they began to individuate them accordingly. When composers began to individuate works as embodied expressions and products of their activities, they were quickly persuaded that that fact generated a right of ownership of those works to themselves. Thus, as music came to be seen as the product of a free person's labour, a change

Anne Barron, in an important revisionary contribution, has questioned the claim that the legal concept of the musical work is identical to the musicological category. She identifies a shift – ‘largely internal’ to legal doctrine – from ‘physicalism’ to ‘formalism’. Cultural artefacts, says Barron, ‘present complex questions of attribution and identification’ (p. 42) that cannot be solved by analogy to physical tangible things. A formalist solution, first developed in the British ‘literary property debate’ of the eighteenth century would define property rights that will figure in market transactions, and necessarily extend ‘beyond the inscribed surface of a book’s pages’ (p. 43). Thus legal logic produced its own abstract work concept well before the idealist, romantic shift took place in aesthetic discourse.

Sociologist Lee Marshall goes even further in his book on bootlegging (2005, 24): ‘As copyright law ... acts as architect of modern proprietary authorship, it is fallacious to think of modern authorship as existing outside of copyright.’ We can no longer abstract authorship from the market relationships of production, distribution and consumption constituted by copyright law.

Whichever explanation one might follow⁹, it is evident that by the end of the nineteenth century, an international architecture of copyright law was being erected that took its lead from the concept of an original, self-contained, abstract work: the modern ‘black box’ of copyright law. Under the Berne Convention originally signed in 1886¹⁰, the full value of ‘every production in the literary, scientific and artistic domain’ was awarded to the author (in practice mostly successors in title, i.e. corporations). Translations, reproductions, public performances and adaptations fall under exclusive owner control for a term derived from the life-time of the author, plus at least 50 years (in the US and the European Union where *post mortem auctoris* terms of 70 years are now provided, this can easily amount to a copyright duration of 120 years).¹¹ Exceptions to exclusive rights are only permitted ‘in certain special

was deemed necessary in ownership rights.’ (Goehr 1992, 218) For further discussion, see Kawohl and Kretschmer’s paper below.

⁹ Other explanations of copyright law might adopt a Marxist conception of law as the representation of the conditions of production in capitalism (Edelman, 1977 [1973]), an orthodox economic explanation as an efficient regulatory response for the allocation of resources (Landes & Posner 2003), an political economy explanation of regulatory capture (Kay 1993; Lessig 2004; May 2000) or an understanding of copyright law as part of social processes in networks of collaboration and competition (Toynbee, 2001). The production of culture perspective does not seek any explanation of the production system itself, and may thus be compatible with any of the above approaches.

¹⁰ The latest version of the Berne Convention is the Paris Act 1971, as amended in 1979. The US acceded to Berne only in 1989. In 1994, the Berne Convention was integrated into the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) that is all 151 members of the World Trade Organization (as of 27 July 2007) are now bound by it. The exception is Art. 6bis, the unwaivable *droit moral* that was excluded at the behest of US negotiators following lobbying pressure from Hollywood. Art 6bis specifically protects the author’s right to claim authorship (paternity right), and to object to changes that would be prejudicial to his honour or reputation (integrity right), even after the transfer of all exclusive copyrights. Thus the *droit moral* somewhat limits the freedom of corporations to exploit works without recourse to the author.

¹¹ The European Copyright term was harmonized to life plus 70 years with the 1993 Council Directive (93/98/EEC). The US Sonny Bono Copyright Extension Act (1998) extended the term by 20 years to life plus 70 years, or 95 years for ‘works for hire’ (works created under employment by corporations, for example sound recordings). In Europe, sound recordings, broadcasts and performances are only protected as neighbouring or ‘related rights’, that is for a term of 50 years from the end of year of the recording or broadcast.

cases', provided that 'such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author', the notorious three-step-test.¹²

User interests or freedoms are not independently conceptualized in Berne, nor is there any recognition that all creative activity draws on other cultural production. Berne works are self-contained and original, not derived from a common cultural domain.¹³

Following Berne, a purely technological reflex appeared to drive the evolution of copyright law. Since the full value of copyright unquestionably should go to the author or owner, the advent of gramophone, radio, television, audio-tapes, video-tapes, photocopying, satellite, cable, computer and Internet technologies necessitated a string of copyright amendments, usually extending the scope of protection to a technologically unforeseen activity.¹⁴

The contributors to this special issue offer different responses to this 'reverse determinism' under which new technologies and cultural practices are pressed into a conceptual box that was constructed 200 years ago. While Bently [at 4] is sanguine about the possibility of a closer 'correspondence between legal ways of understanding culture and dominant aesthetic understandings', Pietila traces persisting social structures despite upheavals in technology and the law. Kawohl and Kretschmer call for a re-assessment of the traditional copyright approach to infringement. Tschmuck diagnoses an inherent trend in copyright law to industrial concentration. Klimis and Wallis deplore a narrowing of entrepreneurial options. All suggest that the schism between contemporary cultural production and copyright norms is likely to persist for some time.

Conclusion

This special issue is a cross-disciplinary effort that seeks to re-engage in questions about the production on culture. We argue that sociologists and communications scholars have overlooked recent scholarship in critical socio-legal and socio-economic studies on copyright. We argue that such insights should cause us to take a far more measured look at 'digitisation'. We argue that too often researchers and commentators have taken copyright for granted and simply sought to re-articulate new technologies and social relations to it. Our argument is that these very objects, music, performance, art are in flux. As such there are opportunities to re-define relationships of production and consumption. The legal establishment is happy to 'update' or re-inscribe old norms into new production forms; our argument is that just as readers of this journal would normally be wary of technological determinism, so they ought to be wary of 'legal determinism'.

¹² Art. 9(2), introduced at the Stockholm revision conference in 1967. Note that under Berne, the three-step-test does only apply to the reproduction right. However, Art. 13 of the TRIPS Agreement (1994) and Art. 10 of the WIPO Copyright (Internet) Treaty (1996) make the test applicable to all copyright limitations and exceptions.

¹³ See further discussion in Kretschmer (2005).

¹⁴ Only where exclusive protection was deemed to be unenforceable, as for music performances and broadcasting, photocopying by libraries, cable re-transmission or in private copying, was a mechanism of licensing via collecting societies adopted in many countries. The principle of collective licensing is still 'pay-for-play' but at a rate that is not negotiated individually. In effect, it substitutes owner exclusivity with a right of remuneration.

In this paper, we have initially followed the strategy developed by ‘the production of culture’ literature that has been relatively neglected in mainstream cultural studies and communications studies. For us, this approach has a very useful function; it ‘brackets out’ cultural judgement. Of course, Peterson and his followers have been criticised for taking such a nominalist and empiricist approach; we do have some sympathies with such criticisms. However, for us applying Peterson’s perspective to the legal aspects of music production opens up a critical space within which we may examine the construction of copyright norms. We have suggested that one possible strategy might be to develop a constructivist argument in relation to the notion of copyright, this points us in the direction of questions about the very ontology of copyright and the objects that it defines. What is needed is nothing less than a reconstruction of authorship in which the logic of law can be seen to leave its own imprint.

We hope that by presenting a range of papers that begin to question the relationship between copyright and cultural production (not necessarily following our provocation) that it will have two outcomes for a multi-disciplinary audience. First, that scholars of sociology and communication studies might take a more critical stance on the status of the law and regulation in the constitution of objects of governance: be they the internet, telephony, stories, or music. They might look more closely at the co-constitution of cultural forms such as music less through the lens of macro-objects such as technology and society, and more through micro-hybrids; rather than the law being a ‘regulator’ in the background we might better see it as an integral participant.

Secondly, we can perhaps view the current struggle in music production, distribution and use in such a manner. This is a struggle more about defining what is, or is not, an object, and who has rights over its use than one of a balance of public and private ownership. It is a debate that will inevitably spread across all media forms. Currently, many media forms are locked by being irreducibly linked to physical objects (such as books, newspapers or CDs), the movement of which can be traced. This is the control of copyright by default to physical objects. Once ‘released’ through the process of digitisation, a new process of ‘formalisation’ (in Barron’s sense) is either inevitable, or the market may have to retreat from the sphere of information. This special issue seeks to articulate the conditions for this choice.

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