

## **Copy rights: The politics of copying and creativity**

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### **Abstract**

This article analyses the politics of copyright and copying. Copyright is an increasingly important driver of the modern economy, but this does not exhaust its significance. It matters, we argue, not just for the distribution of rewards and resources in the creative industries, but as a site within which established political concerns – collective and individual interests and identities - are articulated and negotiated, and within which notions of ‘originality’, ‘creativity’ and ‘copying’ are politically constituted. Set against the background of the

increasing economic value attributed to the creative industries, the impact of digitalization on them, and the European Union's Digital Single Market strategy, the article reveals how copyright policy, and the underlying assumptions about 'copying' and 'creativity', express (often unexamined) political values and ideologies. Drawing on a close reading of policy statements, official reports, court cases, and interviews with stakeholders, we explore the multiple political aspects of copyright, showing how copyright policy operates to privilege particular interests and practices, and to acknowledge only specific forms of creative endeavour.

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## **Introduction**

Our argument is that copyright and copyright policy, typically the province of intellectual property lawyers, warrants the closer scrutiny of political scientists, because copyright affects the distribution of resources and rewards and because it manages the tension between collective and individual rights. How these matters are resolved is important materially and culturally for all societies, and their resolution is a consequence of political processes and political values. But there is, we suggest, more at stake than this. Copyright also serves to construct ideas of ‘creativity’, ‘originality’ and ‘copying’. These are ideas that matter profoundly to the vision of the liberal society and the individuals who constitute it. As John Stuart Mill (1972/1859: 132) wrote in ‘On Liberty’: ‘It will not be denied by anybody, that originality is a valuable element in human affairs.’ In this article, we unpack the political principles and judgements that constitute copyright and copyright policy, revealing both how they affect the distribution of resources and opportunities, but also how they construct modern understandings of originality and creativity.

According to the Department of Culture, Media and Sport (DCMS, 2015), in 2014 the creative industries were worth £76.9bn to the UK economy; their exports were valued at £17.3bn; and they provided 1.71m jobs. These industries – music, film, television, video games, among others – are heavily dependent on copyright in realizing their economic worth. The music business in particular, according to Patrik Wikstrom (2009: 12), is to be understood as a ‘copyright industry’. Indeed, the body that represents that industry, UK Music, describes copyright as the ‘currency of creativity’ (UK Music, 2010) and as ‘the bedrock of the music industry’ (UK Music, 2014).

Digitalisation has heightened the importance of copyright, facilitating piracy and illegal file-sharing, and impacting on almost all aspects of the production, distribution and consumption of creative content. These transformations drive the EU's determination to create a Digital Single Market (DSM), and to engage in a radical overhaul of the copyright regime (European Commission, 2015; Rosati, 2013).<sup>1</sup> They also lie behind national initiatives to adapt to digitalisation<sup>2</sup>, and the concomitant need to reform copyright (Hargreaves, 2011). These reform programmes have attracted intense political lobbying in Brussels and elsewhere by the corporate stakeholders and those suspicious of their motives (for example, the Open Rights Society, the Electronic Frontier Foundation and European Digital Rights [EDRi]). The EU's consultation on copyright attracted 9,500 replies and more than 11,000 messages (Dobusch, 2014).

This heightened attention on copyright is reflected in electoral agendas. In the 2015 UK General Election, the Conservative (2015: 42) and the Liberal Democrat (2015: 37) parties both referred to copyright in their manifestos.<sup>3</sup> The Green Party called for 'a comprehensive Digital Bill of Rights', with the intention of reducing the role of the market in cultural production and consumption (Green Party, 2015: 61). And while the Pirate Party, formed specifically to reform copyright, may no longer be the force in Europe that it once was (Cammaerts, 2015; Fredriksson, 2014), its sole representative in the European

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<sup>1</sup> The UK's decision to leave the EU is unlikely to affect significantly its copyright law, although it will cease to be subject to subsequent interpretations of that law by the CJEU.

<sup>2</sup> See, for example, 'The UK's Vision for a Digital Europe'; available at: <https://engage.number10.gov.uk/digital-single-market/uk-vision-for-eu-digital-economy-single-market.pdf>.

<sup>3</sup> The Labour Party, the SNP and UKIP, however, made no mention of copyright.

parliament, Julia Reda, is the official rapporteur for the EU's copyright consultation exercise (Reda, 2015).

Despite its increasing political salience, copyright has tended to be overlooked by disciplines other than law.<sup>4</sup> In particular, political studies has been slow to acknowledge its significance, although it is important to note the contribution of work by Jeremy Waldron (1993) on the political theory of copyright, Ronald Bettig (1996) on the political economy of intellectual property, Jessica Litman (2006) on the making of US copyright policy, and Debora Halbert (2014) and Blayne Haggart (2014) on the global politics of the international copyright regime. This article is a further sortie into this field. We explore the political ideas that inform both copyright policy and constitute the underlying practices of copying and creativity. We concentrate on the music industry, and we analyse how political values and assumptions underpin, first, existing copyright regimes, and we examine how political judgements inform ideas of a 'work' that may be 'a copy' or an 'original' and attribute responsibility to an 'author'. In making our case, we draw on policy documents, legal cases and interviews with key actors in the music industry. We show how copyright policy arbitrates between the claims of individuals and those of society, and how it assigns responsibility and agency. In these respects, it is political in the sense adopted by David Runciman (2014: 6): 'the collective choices that bind groups of people to live in a particular way'. But it also acts politically in defining

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<sup>4</sup> For exceptions: in history, see Baldwin, 2014, Cummings, 2013 and Johns, 2010; in music studies, see Frith and Marshall, 2004 and McLeod and DiCola, 2011; in cultural studies, see Decherney, 2013 and Gaines, 1991; in sociology, see van Eechoud, 2014.

‘originality’ and ‘creativity’, and in determining integrity and cultural value in forms of communication.

### **Background: copyright and digitalisation**

Copyright policy is designed to reward and incentivize creators, and to enable society to benefit from the results of their innovation and creativity in the public domain. It does this by identifying the rights of creators and intermediaries to benefit from their contributions.<sup>5</sup> And in recognizing and regulating these rights it establishes what may be claimed as an original work and what a copy, where copying may refer to either the reproduction of a work for commercial purposes or to the plagiarizing of artistic expression.

Both forms of copying have been affected by digitalisation. Arguably the music industry has felt these effects most sharply (Negus, 2015). The recording of music in digital form (as opposed to analogue) has meant that it becomes possible for copies to be made with no loss of quality; it has also meant that music could be ‘shared’ much more rapidly than was possible with analogue media such as cassette tapes (and even with copied digital CDs). Within the legitimate market, digitalisation has made possible internet radio and streaming services which introduce new possibilities and problems for the licensing of music and for rights collection. Digitalisation has also extended the creative possibilities available to artists, making the sampling of music a great deal easier and more sophisticated, expanding what it is possible to deliver in a live

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<sup>5</sup> The cast list is long, but includes composers, performers, record labels, and publishers.

performance, and facilitating new forms of collaboration and integration within, and between, cultural forms and media platforms (Vermallis and Herzog, 2015).

As with any such technological change, there is a danger of exaggerating the extent of its effects. Illegal copying was an issue before digitalisation and before the internet, hence the music industry's campaign for blank tape levies in the 1980s (Knopper, 2009). Sampling was possible with analogue tape and a razor blade. And there have always been those who contend that copyright is the problem for, rather than the solution to, enhancing creativity (Boldrin and Levine, 2008; Lessig, 2005; McLeod and DiCola, 2011). But even if digitalisation merely exacerbates the problems of copying, there remains the question of when and how copying is deemed acceptable or unacceptable practice. Copying has always been a feature of cultural practice (Heylin, 2015; Levine, 2014). As Jessica Litman (1990: 965; her emphasis) writes: '... the very act of authorship in *any* medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea'. Copyright, therefore, is not about originals versus copies, so much as discerning 'good' from 'bad' copying, and in determining what is 'fair' for the parties involved.

### **Constituting copyright: political principles and political interests**

Copyright itself is one element of the more general regulation of knowledge and its creation. The particular form it takes is, in a large part, a matter of historical contingency. Nonetheless, the need for such regulation, and the debates about what form it should take, are informed by both political interests and political principles.

In the music industry, competing interests have been most vividly revealed in controversies over the royalty payments accruing from the streaming services such as Spotify, Deezer and Apple Music (Seabrook, 2014; Cooke, 2015). Artists have complained that multiple streams of their work have generated a pittance in royalties<sup>6</sup>, and have acted to challenge the existing system by creating new services (such as Tidal), by withdrawing their catalogue (as Taylor Swift did with Spotify) or by advocating legislative or regulatory change (Dredge, 2015; Linshi, 2014; H.R. 1283 – 114<sup>th</sup> Congress and Ne-Yo, 2015; Williamson, 2015). These skirmishes have taken place against a backdrop in which copyright, according to Alex Cummings, (2013: 3-4), is increasingly allied to corporate strategy: ‘the shift from a hands-off cultural policy that emphasized free competition (copy and compete) to a more aggressive stance that protected capital investment in the name of economic growth.’ The result, according to US critics (Boyle, 2010; Gillespie, 2007; Herman, 2013), has been a victory for vested corporate interests and a more restricted cultural space. Whatever the outcome, these struggles have been couched in terms of competing political principles (Toynbee, 2006).

Copyright is typically understood as an attempt to balance the rights of individual creators against those of the wider society to enjoy the benefits afforded by common creative culture. This is as true for those, like the Pirate Party, who challenge the copyright regime, as it is for those who endorse its current form. One of the founding principles of the US Constitution is: ‘To

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<sup>6</sup> The writer of a song that had been streamed 178 million times claimed that he received £3700 only (Butterfly, 2015; see also Byrne, 2013). Others have suggested that rewards from streaming are not out of line with standard industry practice (Marshall, 2015).



promote the Progress of Science and useful Arts, by securing for limited Times to their Authors and Inventors the exclusive Right to their respective Writings and Discoveries.’ (Art. 1, Sec. 8, Clause 8) In the same spirit, the UN Declaration of Human Rights states: ‘(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from scientific, literary or artistic production of which he is the author.’ (Article 27) These general statements of principle take more specific form in the Berne Convention for the Protection of Literary and Artistic Rights (1886), which establishes how and where these rights apply, and continue to find expression in such policies as the EU’s Information Society Directive (Recitals 10 & 11, 2001/29/EC).

Encoded within these balancing principles are further claims, based either on the Lockean property or natural rights of individual creators, or on some notion of collective, utilitarian welfare benefit (Stokes, 2003: 10-19). These are not, though, discrete alternatives. As Waldron (1993) notes, artists depend on others, whether in the form of prior creative work and traditions, or in the form of infrastructural support. The rights claimed do not derive only from the labour theory of value, but from ideas of personal integrity and rights of communication, which lead to the suggestion that artists should be seen as ‘creators’, rather than just ‘proprietors’ (Barron, 2006; Biron, 2014).

The way that political regimes resolve the tension between these conflicting approaches might be seen to exemplify these multiple considerations. Hence, in China the collectivist principle holds sway in the insistence that copyright protection is directly linked ‘to the building of a socialist society that is

advanced ethically and materially, and promoting the progress of and flourishing of socialist cultures and sciences' (Copyright Law of the PRC, Art. 1). While in liberal political regimes, there are variations between those that recognize the artist's 'moral rights' (as contained in the Berne Convention) to determine how their work might be used, and those that do not.<sup>7</sup> Other variations include the so-called 'parody exception' – the right to use existing works to mock or satirize – that is recognized in some jurisdictions, but not others. This is not a matter of technical detail, but of expressive freedom (Jacques, 2015).

Copyright as a property claim co-exists with copyright as an integrity claim or a claim to freedom of expression (Lee, 2015). Which principle is privileged has consequences for - to repeat Runciman's definition of politics - 'the collective choices that bind groups of people to live in a particular way'. As Alina Ng (2008: 424-25) explains: 'Shifting the ethics for copyright from a utilitarian-based approach, which justifies property rights as necessary to further larger public goals, towards a natural rights framework, which justifies the grant of rights as natural entitlements, allows authorial and social rights in literary and artistic works to be allocated on principles of fairness and justice.' Copyright policy does not seek to resolve only the tension between the individual and the collective, but to define what constitutes the making of a creative or original contribution.

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<sup>7</sup> This right is typically difficult to assert, especially in the U.S., which has applied a comparatively narrow interpretation of the Berne convention and where a patchwork of federal and state provisions applies without explicit codification for 'moral rights' pertaining to music. Musicians' objections to the use of their music, for example by politicians, typically take the form of public disavowals (as with Neil Young and Adele against Donald Trump), or (as with Jackson Browne and John McCain) appeals to the property provisions of copyright and other IP codes.

These complex issues can be played out on the global stage. China's recent reform of its copyright regime, for example, while still framed by collectivist principles, has been driven by an imperative to comply with the rather different principles and values of the World Trade Organisation (WTO), the World Intellectual Property Organisation (WIPO) and The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) protocols (Halbert, 2014; Street et al., 2015). In a similar way, the European Union has been seeking to harmonize its copyright regime in order to create the conditions for the digital single market. This too has revealed competing priorities, embodied in division between the Commission and the Parliament. Where the former has justified policy reform in terms of the commercial value to be realized, the latter has been more concerned with copyright's cultural contribution. These are not mere differences of emphasis, but of principle and impact (Dietz, 2014).

The resolution of these conflicts matters to the material interests of creators, corporations and consumers, as well as to the character of the wider culture (Burkart, 2010; Hesmondhalgh et al, 2015: 113-21; Kretschmer, 2016). It also engenders debates about the need for (and value of) copyright. Those who seek its abolition contend that copyright is not relevant as a source of revenue to those who are its intended beneficiaries (typically, musicians, rather than, say, fans): 'If we were to abolish copyright today, we are confident that the most important effect would be a vast increase in the quantity and quality of music available' (Boldrin and Levine, 2008: 106). Others of a similar inclination refuse to acknowledge the founding tenets of the dominant account of copyright: 'Copyright infringement is not theft because copyright is not a kind of property capable of being stolen. Copyright is a limited set of rights that gives the owner

the ability to prevent the public from making *some* uses of creative material for *some* length of time' (Malcolm, 2014: np). For these critics, copyright is to be explained rather than justified, and the explanation is to be found in the material interests of corporate players, and in the capitalist system that they inhabit (Stahl, 2013).

There are other critics who, while they do not seek the abolition of copyright, argue that there is a mis-match between the policy and the actual practice of contemporary artists, and as a result copyright fails to sustain a culture of creativity. The extension of the term of copyright protection, for example, has been argued to break with the US Constitution's commitment to culture accessible to all (Laing, 2004). It has also been suggested that copyright policy enshrines a particular European, fine art tradition, in which creativity resides with the work of a solitary genius (Butt, 2015; Rosen, 2008: 4-5). Such an ideal is at odds with the collective working practices of musicians (and indeed of almost all art) (Bently, 2009; Firth, 2015). For similar reasons, rights are ascribed to the melody and words of a song, but not the arrangement, the rhythmic patterns or the other sonic features contributed by the accompanying musicians. Copyright law, to this extent, privileges particular kinds of musical expression, and fails to protect other forms. Olufunmilayo Arewa (2006 and 2011) has sought to show how the law can be used to close down creativity (in particular, in the use of music samples). 'Copyright frameworks that reflect a broader range of musical practice', argues Arewa (2011: 1846), 'will facilitate creations by innovative musicians who might otherwise be dissuaded from borrowing to create music because of copyright conceptions that do not encompass their particular forms of creativity.'

In summary, we have argued so far that political values and principles are implicated in copyright policy, and that these give rise to conflicts that matter both materially and culturally. This does not exhaust the politics of copyright, if only because of the very general, underdetermined nature of the principles involved. Underlying the politics of copyright policy, and the broad political principles that provides its rationale, are the politics of *copying*. Here the argument is about what is meant by, and valuable in, 'originality' and 'creativity'. These are terms that have often been overlooked by politics scholars, but which appeal to, and depend upon, political judgements and which feed into wider understandings of liberal individuality.

### **From the politics of copyright to the politics of copying**

Copyright is intended to protect the 'original' and to weed out the 'unauthorized copy'. As such, it is political in the sense that it affects the distribution of resources and establishes rules of collective behaviour. But the politics do not end there; they extend to how 'originality' is understood (Rahmatian, 2011). What counts as 'original', as Marcus Boon (2010: 49) argues, is 'not an objective fact but a historically specific style of presentation.' In what follows, we explore how, in the implementation of copyright policy, courts construct 'historically specific' notions of creativity and originality that are themselves politically inflected. '[C]ourts play an important role,' writes Arewa (2006: 641), 'in helping to determine the shape and nature of acceptable cultural production.'

We begin with one of the most high-profile of recent cases, that involving the song 'Blurred Lines'. In 2015, those acting on behalf of the singer Marvin

Gaye sued Pharrell Williams and Robin Thicke, the composers of 'Blurred Lines' (2013), for infringement of copyright (Williams et al vs Bridgeport Music, Inc. Case number: 2:13-cv-06004). 'Blurred Lines', it was claimed, copied Gaye's song 'Got to Give It Up' (1977). The ruling, delivered in 2015, went in favour of Gaye, and the composers of 'Blurred Lines' were ordered to pay \$7.4m in compensation.<sup>8</sup>

While the court's decision might seem to be just another case of plagiarism punished, much more was entailed. First, there was the question of what exactly was being protected by copyright and what was being copied. The musicologists who appeared for the prosecution, consultant Judith Finell and Harvard ethnomusicologist Ingrid Monson, claimed that there was 'a constellation of similarities' between the two songs which could be specifically identified. These 'similarities' were, however, contested by other experts, who argued that, in respect of those elements of the song that are most commonly used to claim protection by copyright in court (the lyrics and the melody), the two songs had virtually nothing in common. Typical of this position was the musicologist Joe Bennett (2014), who contended that the two songs were different in the beats per minute, the instrumentation, the lyrics, the melodies, the chord patterns, and the key. Bennett, like a number of other critics, argued that all the songs had in common were a 'feel' and 'groove', and that applying copyright to these would be to risk making a 'genre' the subject of copyright, and hence to harm profoundly a culture of musical creativity.

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<sup>8</sup> The compensation was reduced to \$5.3m in July 2015, and in December 2015 Williams et al filed an appeal (CA No. 15-56880).

Other musicologists refused this stark dichotomy between plagiarism and originality. Robert Fink (2015), for instance, insisted that it was necessary to look beyond any ‘surface coincidences’ and to demonstrate how the songs ‘at a deeper level’ contained ‘melodic, harmonic, and rhythmic’ similarities. Fink (2015, np; his emphasis) argued:

One of the incorrect lessons observers are drawing from this verdict is that it means you can be sued for copying the ‘feel’ or ‘vibe’ of an existing song. Nothing could be further from the truth. The argument was ostensibly made, and ostensibly accepted by the jury, *only* on the basis of similarities that could be captured in musical notation.

In reaching its verdict on this basis, the court was privileging music that could be notated in respect of the dominant values of white western art music (melody, chord sequence and structure, and the semantic understandings of lyrics – those aspects identified by Bennett in his critique), rather than in respect of the aesthetic qualities valued in much African America music (rhythm, feel, timbre, texture, lyrical and vocal gesture). In discriminating in this way between what was to be valued for the purposes of copyright, the ‘Blurred Lines’ case, Fink (2015) suggested, was informed by a racial politics and history of appropriation, and that it offered:

a way to punish an unsympathetic pair of defendants and right, at least by proxy, a whole history of unfair appropriation ... Not only did Thicke and Williams embarrass themselves in court, they did it against Marvin Gaye, perhaps *the* tragic example of how African-Americans have struggled for artistic freedom within a music industry built on the systematic exploitation of their labor and creativity

Read like this, copyright brings into play a broader awareness of the history of appropriation within a political economy of African American music.

Also implicated in the 'Blurred Lines' case - and copyright more generally - is the further question of what constitutes a 'work' - that which may or may not be copied (Pila, 2010). The answer to this is also a matter of politics. As Mireille Van Eechoud (2014: 163) notes: 'The work concept ... causes law to favour scored music over improvisation, melody over harmony and rhythm, to give author-composers more power than performers.' In other words, court interpretations of copyright law serve to recognize particular forms of music and to distribute rewards to specific actors (composers) in acknowledgement of their skills (and hence, not to recognize other musical forms, performers and skills).<sup>9</sup>

The legal construction of the work and of originality are not bound by ordinary language understandings of terms such as 'novelty' or 'innovation' or indeed 'creativity'.<sup>10</sup> 'Original' refers only to the act of originating something, irrespective of its finer qualities (or lack thereof).<sup>11</sup> All that is required to determine whether something has been copied depends on matters of 'similarity' and 'access'. The first concerns the resemblance between two works; the second involves the question of whether the defendant had access to the copied work.

Both issues are tested in court, but where everyday understandings of originality

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<sup>9</sup> A football match does not qualify as a work for the purposes of copyright, according to the CJEU, because the game is determined by its rules, and therefore does not allow for 'creative freedom' on the part of the players (individually or collectively) (Van Gompel, 2014: 100).

<sup>10</sup> French IP law, for example, provides no definition of 'originality'; whereas UK law is silent on 'creativity'.

<sup>11</sup> Judicial notions of 'originality' tend to combine Romanticism with a narrowly understood labour theory of value (Barron, 2006; Lutticken, 2002).



do not apply, 'common sense' is used to determine whether copying has occurred..

Juries or judges decide whether 'in human experience' it is possible that 'the two works could have been independently created.' The courts ask whether a 'reasonable juror could find substantial similarity of ideas or expression' or 'whether the ordinary, reasonable audience' would see substantial similarity in the 'total concept and feel of the works' (Loomis vs Cornish, US District Court, Central District of California, CV12-5525 RSWL(JEMx)). And judges rule as to whether or not the use of the same words or images in two songs was a coincidence; that is, the unavoidable consequence of a shared, common culture (Peters vs West, No. 11-1708, 7<sup>th</sup> Circuit, 20012).<sup>12</sup> In short, judgements as to whether copying has occurred depends on appeals to the notion of an 'ordinary' and 'reasonable' jury or audience, or to the idea of a 'common culture'. These might be seen as appeals to principles of democratic justice, but they depend on the highly contestable notion of what is 'normal' or 'common'.<sup>13</sup>

Just as courts create rules and methods for defining what is 'original' in a 'work', they also establish narratives of creativity, determining who is responsible for the original contribution. There is a tendency to assume a single originating author, discounting the possibility of collective creativity (Barron, 2006; Bently, 2009; Free, 2002).

This assumption has generated a long history of court cases in which members of bands have gone to court in pursuit of the claim that they made an

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<sup>12</sup> The case involved Kanye West, and one issue was whether the phrase 'what does not kill you, makes you stronger', which featured in the song, was in common usage.

<sup>13</sup> Decisions of this type are not exclusive to the US courts, but the determination of copyright abuse varies considerably across jurisdictions.

original contribution to the success of those groups, but were not justly acknowledged or rewarded for that contribution.<sup>14</sup> Courts are required to determine who has made ‘an original contribution to the Work’ (Fisher vs Brooker, 2006, para 42). In the making of such judgements, the idea of originality can become unhitched from its neutral understanding, and become instead freighted with political values and perspectives. As Jane Gaines (1991: 12) argues: ‘Judicial discourse ... will hold forth on the strict legal definition of “original work” as nothing more than a work produced by an originator. But it may then abruptly lapse into value judgements that betray preference for elite culture’s dismissal of anything that is “imitative” or genuinely “original”.’ In the case that Gaines has in mind, it was not the words of a song (and their ‘originality’) that was at issue. It was a matter of whether a *vocal style* deserved copyright protection. The singer Nancy Sinatra brought a case in which she claimed that her vocal mannerisms were being deliberately and illegitimately imitated in an advertisement. Her claims to her own sound and style were being infringed. Sinatra saw copyright law as a way of protecting her integrity and identity.

The court decided otherwise. Sinatra’s vocal style was not deemed to be ‘property’ to be owned by, in this case, the singer (Gaines, 1991: 115). *Duplication* is prohibited, it was decided; *imitation* is not (Gaines, 1991: 121). For Gaines (1991: 9), the law’s understanding of ‘likeness’ set limits to ‘the available pool of expressive gestures’. It did so on the basis of a particular account of property rights. And implicit in Gaines’ criticism of the decision was an

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<sup>14</sup> They include Procul Harum, The Smiths, Barclay James Harvest, The Bluebells, and Spandau Ballet.

alternative understanding of the relationship between art and the artist. Rather than being a matter of property ownership, art was to be seen as an extension of the person.<sup>15</sup>

The issue of ownership also arose in the ‘Blurred Lines’ trial, where Robin Thicke’s attorney argued that ‘no one owns a genre or a style or a groove’ (quoted in Brown, 2015). Insofar as the finding of the court was that a style could be plagiarized, Fink (2015) argued that the payment awarded to Marvin Gaye’s estate entailed the monetizing of ‘black creativity’, and provided ‘intellectual justification for fencing off more of our shared heritage of sounds, grooves, vibes, tunes and feels from the people who need it most’.<sup>16</sup> This is not necessarily a critique of copyright as such, but rather a recognition that the decisions made in its name have wide-ranging cultural and political significance.

Creativity is not a product of an unfettered imagination, but of a shared culture and of a regulatory regime (Negus and Pickering, 2004). Indeed, Jon Elster (2000) contends that creativity *depends* on working within the constraints imposed upon it, rather than on ignoring or defying them. It entails borrowing and playing with the styles adopted by others, and copyright can either facilitate or hamper this process. As Stef Van Gompel (2014: 112) argues:

Copyright law recognizes creative constraints imposed by rules of genres in literature, film, visual arts, music, and so on, insofar as ‘style’ is

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<sup>15</sup> It is important to note, however, that there are instances where a performer’s right to their distinctive style is protected, as was demonstrated in cases involving Tom Waits and Bette Midler. The protection afforded, though, derives from rights of ‘publicity’, not copyright (Demers, 2006: 59-67). Our thanks to one of our *Political Studies* referees for this point.

<sup>16</sup> Similar concerns have been expressed about how the extension of the copyright term to 70 years has made much cultural heritage unavailable and inaccessible (Heald et al., 2015)

excluded from protection. This means that authors are free to use the shared characteristics of form, content, style, or mood of existing genres, as long as they refrain from copying the original expression of specific works within those genres.

So where Gaines sees the need to protect 'style' in the name of individual integrity, Van Gompel argues that 'style' represents a common resource for a democratic culture. What are being contested here are not just the conditions of creativity, but the definition of originality and what it represents. These matters touch, as we have seen, on notions of property and individual integrity, and on assumptions about what marks 'originality' and how responsibility might be attributed. They raise questions of racial and cultural politics, and of identity, individuality and generic or stylistic convention.

### **Sampling and the politics of copying**

The politics implicated in copyright come into especially sharp focus when we consider the example of sampling, the re-use of recorded elements of musical works to create a new work. Sampling might seem to be a practice of minor aesthetic or cultural detail, but not only is it a widely used musical technique (with equivalents in other cultural forms, including literature and film), but it too engages with a complex politics of ownership, discrimination and cultural rights. While it varies with jurisdiction, the law on sampling has been established over time, in response to the technology that has made it an increasingly easy and more common creative technique. The 1980s are seen as a 'golden age' of sampling, when the law was unformed and those responsible for administering it were either ignorant or indifferent. This changed in the 1990s, when the need to

get permission for samples became – effectively – mandatory (McLeod and DiCola, 2011: 20-35).

In the new order, according to Kembrew McLeod and Peter DiCola (2011: 16; see also Arewa, 2006), copyright law served to ‘discriminate[s] against sampling.’ What this means is that the freedom to borrow allowed for by (US) copyright law – the right to parody, to make cover versions, to mimic a style – does not extend to ‘fragments of sound recordings’ (McLeod and DiCola, 2011: 16). Thus, those who use this particular creative form are restricted in ways that other artists are not. As a result, writes Martin Scherzinger (2014: 176), ‘copyright law applies unevenly to different musical genres, often tinged with an ethnically inflected bias’. Yin Harn Lee (2015) draws a similar conclusion, based on a systematic review of sampling cases in the US and Europe. The courts have, she contends, made the creative use of samples either difficult or prohibitively expensive. It is difficult both because the granting of a licence may be matter of ‘whim’ on behalf of the right holders. It is expensive because fees for samples may range from \$100 to \$10,000. The result is a restriction ‘on users’ exercise of their creativity’ (Lee, 2015: 124; see also Jacques, 2016 and Vaidhyathan, S., 2003).

Two US court decisions in particular, argues Lee (2015: 125), ‘have created a bright-line rule that effectively precludes all such sampling, regardless of the quantity or quality of the samples taken’. In one of these cases – involving a sample of Gilbert O’Sullivan’s ‘Alone Again (Naturally)’ – the judge branded sampling as ‘theft’ or ‘stealing’. No allowance was made for the fact that sampling was widely practiced and might be deemed a legitimate ‘art form’ (Theberge, 2004: 151). In the second case – involving the hip hop group NWA – the court

determined that ‘substantial similarity’ was not relevant. To take a copyrighted extract was an offence in itself, even if it was then transformed (by looping, pitch control and other manipulation techniques) out of all recognition.<sup>17</sup> While almost all musical traditions have depended upon creative borrowing, the law on sampling had an especially adverse effect on those who borrow in this particular way.

But the politics of sampling do not just lie with the restrictions imposed on those who sample but also on those who are sampled. David Hesmondhalgh (2006) takes the case of the musician Moby and his album *Play*. This extremely successful record – each track of which became a soundtrack to an advert – sampled music from a range of artists, especially African American ones. While Hesmondhalgh (2006: 54) declares himself sympathetic to the claim that copyright law has unjustly hampered the creativity of samplers, he draws attention to the ‘complex cultural politics’ involved. One aspect of these politics is the effect of borrowing – in the form of a sample – on ‘more vulnerable social groups’ and the possibility of ‘unethical borrowing practices’ (Hesmondhalgh, 2006: 55 & 57). Hesmondhalgh argues that Moby’s use of samples is an example of an unethical appropriation that serves to advance Moby’s interests, and to efface those of whom he samples. Hesmondhalgh is not claiming that anything illegal or underhand was done; the samples were licensed and the right holders

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<sup>17</sup> There are signs that the law is changing on this, becoming more relaxed in what it prohibits, albeit to the advantage of established stars. See *VMG Salsoul vs Madonna Ciccone*, 9<sup>th</sup> Circuit Court of Appeals, June 2016, D.C. Case No: 2:12-cv-05967-BRO-CW

compensated.<sup>18</sup> His point is that this compensation fails to acknowledge a more profound injustice.

Against this charge, Barry Shank (2014) weighs in the balance the pleasures to be derived from Moby's use of African American voices. These pleasures constitute the songs' 'political force', and this latter 'cannot be canceled by claims of appropriation, no matter how accurate those claims may be.' (Shank, 2014: 37). Whatever Shank means by music's 'political force', his argument with Hesmondhalgh derives from essentially contested claims about culture and cultural heritage, about individual integrity, and about the conditions of creativity and the morality of copying. To this extent, their debate serves to underline the political stakes in copyright, stakes that, as we show in the next section, are confronted and resolved by musicians in their working lives.

### **Making music, making claims**

In focusing on the pronouncements of courts and policy-makers, and in building on our claims about the politics of copyright from these, there is a danger that we overlook the routine practices and understandings of those who are most directly involved in the process. It is one thing to examine the principles which copyright embodies and the interpretations put upon them by the courts, it is quite another to suggest that this is how creativity and originality are lived.

We know from experimental evidence that the value placed on intellectual property does not conform straightforwardly to the assumptions made by those who posit rational economic actors (Buccafusco and Sprigman,

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<sup>18</sup> Although the beneficiary may not be the artist if they do not hold the copyright.

2010). But if they do not fit the standard economic model, how do musicians and others see copyright and its relationship to their creative practices? We report here on interviews conducted with musicians and others in the music industry in which their attitudes to, and perceptions of, copyright, creativity, originality and copying were explored.<sup>19</sup>

Musicians and songwriters readily acknowledge that they learn their craft through imitation.<sup>20</sup> This was true of those we spoke to, and of those interviewed by others (Rachel, 2013; Zollo, 2003; musician, personal interview, 28 January 2014). Musicians as diverse as Mick Jones of The Clash and the avant-garde composer John Cage have admitted that their work leaned heavily upon that of others (Perrett, 2014). Musicians admit that copying was either an expectation of their employment or was a product of an ever more demanding workload (songwriter and producer, personal interview, 20 March 2014). ‘In the olden days,’ one musician (personal interview, 6 October 2014) told us, ‘if I came up with a tune that sounded a bit like something else, I would dismiss it instantly. ... but now, slowly, and just through sheer demand, because I have to write a song a week and produce it and get it out, because that’s the business ... I never consciously rip anything off ....It’s copying but it’s not plagiarism as such... music has always been a progression about people learning from each other.’ It is possible to read into this answer the anxieties and dilemmas that songwriters experience, and how they justify their relationship to the work of others. The law plays a very minor, even non-existent, part in these deliberations, but a

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<sup>19</sup> We conducted semi-structured interviews with twenty-five professional musicians, songwriters, managers and producers.

<sup>20</sup> As one of our referees noted, the same may not apply to other cultural forms – comedy, for example, where convention holds that jokes are not to be stolen.



judgement evidently is present. Another musician explained how they felt on being told that their song sounded very like one by another well known musician: 'As soon as they said it, it was like, "Yes, it is, isn't it?" We ummed and ahed, but it was different enough, we felt, to not have to worry about him coming in touch but it's normally like that. ... We don't consciously copy.'

(personal interview, 26 August 2014) One songwriter told us that learning by copying was just 'lazy' (personal interview, 28 March 2014), while The Eagles' Don Henley described copyists as vandals who 'go into a museum and paint a moustache on somebody else's painting' (Michaels, 2014). The fact of these very different views serves only to emphasise that 'copying' is not a straightforward matter, either practically or ethically (Gripsrud, 2014).

'Copying' invites at least two discrete sets of consideration. One is about obligations to others – typically, other musicians. This requires respecting their work and their right to claim authorship. The other is about creativity, about claiming originality for one's own work: 'our ethos really is that we want to try and do something completely new' (musician, personal interview, 26 August 2014). But being 'original', making 'new' sounds, is not straightforward. One musician put it like this: 'Even if I've taken a big chunk of the music they've composed, I've done something to it to make it not their idea anymore, you know.' (personal interview, 18 December 2013) It can vary with genre or form. Improvising jazz musicians expect to 'quote' from others (personal interview, 25 January 2014). Session musicians, paid to produce a particular sound, do not claim 'ownership' of the sound they make; but if they are asked to 'compose' a tune, then the relationship changes, as does the expected reward and recognition (Session musicians, personal interviews, 22 March 2014 and 29 October 2013).

The dilemmas around creativity and credit also emerge in the context of collective work. Attributing copyright to an individual or to a group has real resource implications, and decisions about whether to share credit are political ones, about which those in the music industry are very sensitive (manager, personal interview, 22 April 2014; musician, personal interview, 14 March 2014). These dilemmas become more acute and significant when large sums of money are involved. One musician spoke of how he lost £500,000 in a court case over who had contributed to the writing of a hit song (personal interview, 12 January 2015).

Running through these responses to the dilemmas with which musicians and others deal is the notion of 'fairness'. Individuals talk about the need for fairness in respect of rewards and recognition (NeYo, 2015); those who represent the collective interests of artists and their publishers speak of 'fair rules and fair regulations' (CISAC, 2015); and those who responded to the EU's consultation on copyright policy wanted to see a more fair system (Dobusch, 2014). How 'fairness' is understood varies, but it always entails a political rights claim. This means something very different to the terms in which the standard business model identifies IP rights. Indeed, it is striking how little the law, and the copyright regime in particular, features in the interviews we conducted (where we were talking explicitly about 'copying'). The musicians claim ownership and they acknowledge that they copy and crib, but in doing so they sound more like citizens negotiating conflicting political and moral codes, than legal clients registering claims or business people identifying revenue streams. Their working practices are further evidence of the political character of copying and copyright. This argument does not just apply as a contrast to the business-

based account of rights, it also applies for those like Lawrence Lessig and others who wish to minimize the role of copyright. As Ethan Plaut (2015: 4; see also, Sibley, 2015: 53) points out, the Lessig approach overlooks ‘what of the self – not only labor, but also elements of one’s identity – inheres in cultural products’. It is not a relationship of ownership. They do not see themselves as ‘owners’ of their art, but rather they see their art as coterminous with their identity and integrity.

## **Conclusion**

This article has argued that copyright and copyright policy deserves more attention than it has so far received from political science. Our argument has been that copyright is of political importance in two general ways. First, because of copyright’s economic role, policy has implications for the distribution of resources and rewards. This distribution is determined by both the interests of stakeholders and the political principles to which copyright appeals. These principles appeal to more than straightforward property rights claims, and their enactment entails a range of other values and judgements, and may result in forms of discrimination. To this extent, copyright policy contributes to politics as the collective rules by which we live. More than this, though, we have contended that copyright gives shape to ideas of individual integrity and of cultural expression, and perhaps most significantly to ideas of creativity and originality upon which liberal theory draws, but rarely examines in practice.

As a form of knowledge regulation, copyright builds upon widely accepted views that all forms of originality and creativity depend on borrowing and imitation, and that copyright policy in principle and practice adjudicates

politically acceptable and unacceptable forms of copying. What matters is how it does this and whose interests are served in the process.

Copyright law is not just about the distribution of the money that derives from creative work. The law instantiates certain values; it constitutes a moral order. Similarly, the law serves to regulate market transactions that also encode a morality (Sandel, 2012). This is clearly the case with copyright where ideas of authorship and originality are key. The writer Cory Doctorow (2014: 153) has argued that ‘money can’t be the sole determinant of whether copyright is working’, adding that: ‘I think we can tell a good copyright system from a bad one by what kind of work gets made under its rules’. Our argument, while echoing the tenor of these claims, would add a qualification to Doctorow’s statement: ‘We can tell a good copyright system from a bad one *by what kinds of political principle inform its rules, how decisions are made, and what interests are recognized in the process.*’

The business of being ‘original’ is not simply a matter of formal legal definition, but the result of a complex interplay of lobbying, legal interpretation and everyday practice, among many other factors. Understanding this is important to understanding how one vital aspect of the modern economy operates and the role that policy and the political process plays in it. But, we would like to suggest, there is more entailed. In constituting notions of originality and creativity, copyright is not just serving to organize the creative industries. It is also serving to construct a particular understanding of ‘originality’, which, as we mentioned at the beginning, occupies a central place in notions of the liberal human subject.

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