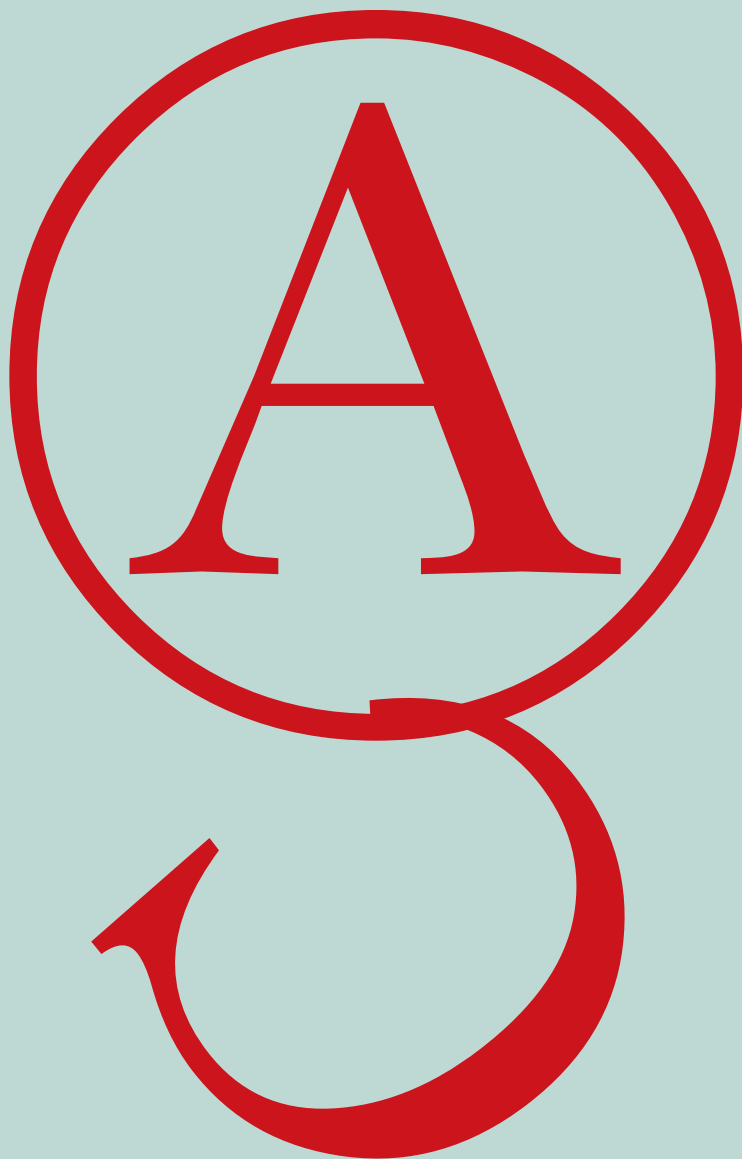Edited by Mireille van Eechoud

The Work of Authorship

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Contents

Voices near and far

Introduction

Mireille van Eechoud

Copyright laws are important regulators of cultural expression, because they grant extensive rights to control the reproduction, adaptation and communication of 'literary' and 'artistic' works. The twin concepts of authorship and original work are central to copyright laws the world over. They might not be clearly defined, and certainly not uniformly, but they enjoy global recognition. That is evident first and foremost by the fact that the Grande Dame of international copyright law, the Berne Convention for the Protection of Literary and Artistic Works (1886/1971), has over 180 contracting states.

One might be forgiven to think that, being concerned with (the study of) regulating creative practices, legal scholars of copyright as well as policymakers are deeply interested in how works get made, how authors operate.

But there is remarkably little in the way of academic publications and policy documents to show that this is in fact so. In the past decade or so, empirical studies of creative and innovation industries are on the rise. They tend to foreground technological and economic aspects of production and use, tracking in a sense the predominant outlook of IP policy makers. That is at least the image that arises when one browses the articles in the e-journal *Intellectual Property: Empirical studies* at the Social Sciences Research Network. It is devoted entirely to quantative research, with a strong orientation towards patents and litigation studies. In the copyright domain, there is a growing body of work on income effects and working conditions for creators in the media and entertainment industries (see e.g. Poort et al., 2013, Kretschmer et al., 2011). Other popular topics include the economic effects of music sampling, or file-sharing on markets for copyright works, or spelling out what it is we do not know (Towse, 2011). More concerned with actual practices, power relations and institutional dimensions are sociologists and anthropologists, for example, the work of Kelty (2008) queries collaborative practices in free and open source software development, including community copyright strategies and norms. Reagle (2010) studied attitudes to 'ownership' and collaboration in Wikipedia communities.

The authors of this volume set themselves the challenge of identifying how insights from a variety of humanities disciplines can help inform the interpretation and construction of copyright law. We considered that legal scholars – especially ones close to legal practices and policymaking – would do well to take note of the accumulated knowledge of the arts and humanities as students of how and why works, pieces, performances get made, what their significance is, how they are read, received, used. For reasons detailed below, we choose to focus on two core concepts in copyright law: the original work and authorship.

We embarked on a three-year research project entitled Of Authorship and Originality. It was funded by a grant from the Humanities in the European Research Area programme 'HERA', a joint effort of national research councils and the EU, managed by the European Science Foundation.[1] One of the principal objectives of the HERA programme is to bring the humanities into the European Research Area and promote humanities research in the EU framework Programmes (the latest one being 'Horizon 2020', with an estimate budget of 70 billion euro). EU programmes have until now had an overwhelming focus on (hard) scientific and technological progress and the development of businesses: an orientation that dominates copyright policy also. Our effort thus mirrored, albeit in a very small corner, HERA's ambition to raise the contribution of humanities research to help 'address social, cultural, and political challenges facing Europe' (HERA 2009).

The goal of this introduction is to 'set the stage' so to speak for the various explorations that follow, of notions of collaborative authorship and original works in academic thought, societal practice and as legal norms. To provide especially the readership not familiar with copyright lawmaking with a useful backdrop, what follows is a characterisation of the current state of copyright law in Europe. I shall briefly describe the role of the EU as primary actor in copyright reform. We can then sketch what the pertinent questions are on authorship and copyright subject-matter, a.k.a. original intellectual creations, and how the authors of each chapter have addressed these. The contributions in this volume all borrow from different disciplines. This introduction concludes with some observations on the many voices in academia that speak on creative practices, and on their relative proximity to copyright scholarship. Although technology and economics will continue to drive developments in intellectual property law, humanities research can (and should) have real impact on the quality of law and legal interpretation.

Copyright reform EU style

In Europe, two major forces drive copyright reform: the realisation of the internal EU market for goods and services, and technological change. The workings of national copyright laws affect the operation of the internal market and therefore in the past twenty years or so the EU institutions have legislated harmonised norms piece by piece, in different parts of the copyright and related rights domains. Directives have been the preferred instrument.[2] To date, most of the harmonisation effort has been in areas where technological change was thought likely to result in diverging legislative responses by Member States.

The first-ever copyright directive was the 1991 Computer Programs Directive, aimed at ensuring that software was treated as a 'literary work' under national copyright laws, at a common originality standard. To unequivocally bring computer programmes into the copyright domain was seen as necessary for the development of software industries. Subsequent directives also responded to exploitation models made possible by 'new' technologies, e.g. on the right to control rental of copies on video, CDs and other media (1992/2006)[3], the right to control satellite broadcasts (1993) and of course the dissemination of works over the internet (2001). The most recent directive, on orphan works (2012), and the proposed Collective Management Directive (2012) also are direct responses to the impact of digital technology. There are only two directives which we can safely say are not technology driven. One is the Term Directive (1993/2006), which lays down rules for (near) uniform duration of copyright and of the related rights of performers, broadcasting organisations, film producers and record producers. The other is the Resale Right Directive, which gives authors of art works (sculpture, painting, photography, installations, and so on) a claim to share in the proceeds of the resale of their work.

A much criticised effect of EU harmonisation is that all initiatives have led to higher levels of protection, for more types of subject-matter, for a longer period of time (Van Eechoud et al., 2009). It has proven to be nearly impossible to harmonise 'down' to the level of protection in the most liberal Member States. This is caused by the mechanics of policymaking at EU level combined with the status of copyright as a quasi-property right in national traditions and under the EU's charter of fundamental rights. Harmonisation is thus mostly upward. The focus on technological and economic concerns does not of and in itself dictate certain outcomes of harmonisation processes. Much is to be said and has been said about the intransparency of agenda setting, the lobbying power of established stakeholders in the cultural and

IT industries, and the quality of evidence on which changes to copyright laws are 'sold'. But that is not the topic of this book. The harmonisation project continues, but especially with respect to author prerogatives – be it exclusive rights to authorise, or merely claims for remuneration for certain uses – harmonisation is by now fairly complete. Our interest is how all the years of piecemeal harmonisation have influenced notions of authorship and work.

Intellectual creations and their authors

Until a few years ago, the obvious impact of EU law on the issue of copyright subject-matter seemed to be limited to computer programmes and databases. On both topics directives prescribed the standards for and scope of protection. It was widely assumed that there was not a truly harmonised notion of what qualifies as an original work in other areas of copyright. Some countries operate stricter standards than others, and there is no uniformity as to the types of productions that are eligible for protection. Many genres are generally recognised as falling in the copyright domain. These include for example all types of texts whether fiction or non-fiction, practical or for entertainment; music, film, photography, visual arts, maps, and applied arts. But there are also categories whose inclusion in copyright is controversial, they may be recognised in some countries but not in others. Examples include perfume, fashion shows, cookery recipes but also certain forms of ex tempore speech.

On the topic of 'work' developments in copyright law have become volatile with the Court of Justice of the EU's judgment in the landmark *Infopaq* case and subsequent judgments (*BSA, Painer, Football Dataco*). The Court has started to construct an autonomous work concept based on the notion of a work being 'the author's own intellectual creation'. The terminology is borrowed from the Computer Programs Directive but can be traced back to the Berne Convention's article on the protection of collections, like anthologies for example, as literary works in their own right. The judgments have sparked much controversy and have far-reaching impacts on the legal systems of some EU Member States (Van Eechoud, 2012). Drawing upon the above cases, in the eyes of the Court a work is an original intellectual creation of the author on condition that it is 'reflecting his personality and expressing his free and creative choices in its production'. In his contribution to this book Stef van Gompel critically examines what the EU court could mean by 'free and creative choices' and what we

can learn about constraints to creativity as identified in art studies and other disciplines.

What seems clear from the Court of Justice's case law is that an intellectual creation easily qualifies as original. In that respect, the judgments are not exactly earth-shaking. In many copyright laws, the work of authorship had already become a vessel that accommodated a very broad array of works of the mind, from 'high art' to 'low art', from the purely aesthetic to the predominantly functional or technical. The standard for protection in many jurisdictions had evolved to the point where 'original' and 'creative' seemed to be synonymous terms, both meaning little more than 'not directly copied' or 'resulting from a modicum of freedom of choice'. Coupled with a the ever-expanding scope of the reproduction right, what does this imply for the linked legal concepts of 'work', 'copy' and 'adaptation'? How can we meaningfully interpret these terms in the digitally networked age, with its possibilities of borrowing, sampling, reworking, appropriation at unprecedented scale? These are questions raised in my chapter on Adapting the work.

Equally important is the question: If everything is a work, does that make everyone an author? The EU directives have little to say on exactly who qualifies as (co) author or initial owner of copyright, beyond some provisions for software, databases and film. There are shared notions of authorship in national laws of course. At present, by and large, national rules on authorship and copyright ownership are still based on the author as an individual autonomous agent operating in relative isolation. This model continues to work well for small-scale production, but is much more problematic in other areas. Three of the chapters in this book are the fruits of contrasting legal notions of authorship with those circulating in creative communities.

How authorship status is attained in law, and viewed in the practices of scientific publishing, literary editing and conceptual art is the topic of Lionel Bently and Laura Biron's contribution. Drawing on sources from literary studies, and the history of science and art, they analyse discrepancies for these sectors between who copyright law recognises as author (and therefore typically owner of rights) and who has authorship status in social practice. As it turns out, copyright, they show 'makes authors-in-law out of social "non-authors"' (and vice versa). In the domain of 'digital' arts, Elena Cooper also explores the diverse ways in which relations between contributors are perceived within creative communities. She does so on the basis of interviews conducted with sixteen artists and poets who use digital technology, considering how and why 'authorship' is attributed to

some contributors but denied to others. Cooper's fieldwork testifies to the wide range of practices and notions of authorship among 'digital' artists and their collaborators. It also brings out how technological change can engender collaborations – as when digital technologies require highly specialised skills – but also return work from collaborative to solitary when technologies become ubiquitous and easy to use.

Collective production processes in the arts hardly began with digital media and the world wide web. They have existed in key artforms such as theatre, dance and music since the dawn of civilization. To contrast the analogue and the digital, Jostein Gripsrud studied a theatrical production at a national repertory theatre in Norway and in his contribution to this volume compares the findings with those of fieldwork among younger musicians/producers involved in professional and semi-professional digital production of popular music. In historical work for the project Elena Cooper uncovered how large-scale collaboration in the analogue age of print took place, in a case study of the Oxford English Dictionary. Its early making relied heavily on volunteer contributions, a Wikipedia model avant la lettre in certain respects.

Many voices, confusing sounds

To ask how 'humanities' research can inform the construction and inter-pretation of copyright norms and concepts is in a way an absurdly broad question: An additional reason for us to focus on notions of authorship, originality and work, since these are areas where it is reasonable to expect a rich body of relevant work within the humanities. Even so, a veritable *mer à boire* remains. What then, are the disciplines that seem to hold particular promise? Art history is one, albeit not for its traditional focus on artist monographs. Instead, Laura Biron and Elena Cooper have considered multiple authorship in copyright through the looking glass of institutional theories of art (2014).

The ever-burgeoning fields of 'creativity studies' are not the predominant ones we have drawn upon. This is because much of the research that at-tempts to model and describe forms of creativity and the circumstances that support creative activity takes the perspective place of (cognitive) psychology, education, or business studies, or sociology (e.g. Uzzi and Spiro, 2005) i.e. social sciences. Theories of creativity tend to focus on one of four 'p's: person, process, product, and press, that is external factors like the environment (Torrance, 1993). Interesting for copyright is the well-known

model of person-oriented creativity that distinguishes between big-C (the creativity of a recognised genius), pro-C (expert-level creativity but not of the kind that has legendary status), little-C (normal day- to- day creativity), and mini-C, i.e. novel and meaningful discoveries each person has as part of learning processes (J.C. Kaufman and R.J. Sternberg, 2010; Kaufman and Beghetto, 2013). Stef van Gompel does consider a number of insights from these perspectives in his analysis of the notion of 'free creative choices', bedrock of the originality standard in copyright law.

Genius, or big-C creativity, is one topic where literary studies, history and legal scholarship have met. The purported influence of Romantic notions of authorship on copyright law has been a topic of rich debate in the US. Twenty years ago, Coombe was happy to report that due largely to the historical work 'intellectual property law has at long last become a field of engaged interdisciplinary inquiry' (Coombe, 1994). In Europe too, the history of copyright and intellectual property law more generally is going mainstream. The recent establishment of the International Society for the History of Intellectual Property (ISHTIP), whose annual conferences are well attended, is testimony to the growing interest. Our understanding of the historical trajectories of copyright laws will undoubtedly also grow as a result of projects that bring together primary sources for academic use, such as the Primary Sources on Copyright (1450–1900) project curated by Lionel Bently and Martin Kretschmer (www.copyrighthistory.org).

That the meeting of literature, law and history leads to insights that can actually help reform copyright is not a given. After reviewing the efforts made in literary studies to reassess the Romantic image of the author, historian Haynes (2005) concludes '… the historicist turn in literary studies has done little to advance our understanding of the history of authorship but has, in fact, often served to perpetuate the Romantic notion of genius it purports to critique'. But even where the Romantic notion of genius has been supplanted, the results do not readily translate into useful insights for lawmaking. Erlend Lavik in his contribution critically examines how literary discourse might have influenced legal discourse and sets out the methodological difficulties involved in unpacking the interplay. He also argues that the Myth of romantic authorship in copyright itself has characteristics of a myth.

The critique of Romantic authorship is argued not just on historical grounds, but also with reference to theories on intertextuality. Here literary studies serve not just to deconstruct ideas of (original) authorship, but of course even more the idea of a stable work itself. Musicology and popular music studies are likewise domains in which critiques of the idea of music

as a 'work' abound. In the chapter on Adapting the work, insights about the artificiality of distinguishing the work (composition) from musical performances are applied to other contemporary instances of 'versioning', notably the process of constant rewriting (versioning) that characterises wiki-style and open source software production. Also, genre studies are brought to bear on the question of when law does (or should) consider a text to be an adaptation rather than a copy, an important difference between the two being that adaptations typically qualify as works in their own right while mere copies do not.

It is near impossible to treat copyright's notion of original creation without turning to aesthetics. Drawing upon both history and aesthetics, Stef van Gompel and Erlend Lavik in earlier work critically examine the conventional wisdom among legal scholars and practitioners alike that the legal concept of 'original work of authorship' must in no circumstances be informed by an assessment of quality, merit or purpose (Van Gompel & Lavik, 2013). Lavik's contribution to this volume maps the confusion that shows up in academic texts and court decisions on the role that aesthetics does, can or ought to play in copyright law. He identifies where aesthetics and legal reasoning overlap, and what kind of contributions we could expect humanities to make especially to the interpretation of standards of originality and work.

It sometimes seems that no PhD thesis on copyright can do without a chapter on philosophical justifications for intellectual property. Usually Locke beats Kant and Hegel as the thinker whose work lends itself best for a justification of copyright, especially in Anglo-Saxon jurisdictions. In her chapter Laura Biron convincingly argues that many of the more popular readings of these philosophers are askew, and that if one seeks to address copyright expansionism, there is promise in the effort to distill from labour, personality, and communicative accounts of intellectual property elements 'that support the idea of authorship as an internally constraining process'.

From the above it is clear that the HERA project has brought together more disciplines than law, literature and history. It has also brought home just how difficult it is to translate insights from one discipline into another. There is a growing openness in international communities of legal scholars to perspectives from other disciplines beyond economics and technology. The 2012 ATRIP (Association of Teachers and Researchers in Intellectual Property) for example was devoted to methods and perspectives in intellectual property and featured contributions from cultural studies, ethics and political science (Dinwoodie, 2014). No doubt the trend towards multidisciplinary research that is evident across academia plays

a role. Especially the disciplines oriented towards empirical studies are the more likely ones to be able to exert influence on the interpretation and construction of law.

In our day, copyright has spread its tentacles into every nook and cranny of human production or as the modern critique would have it: all culture is copyrighted. Lawmaking and interpretation are practices characterised by constructing the general from the specific. It may prove to be of great value to have insights in how cultural productions are created and circulated across all copyright domains. Which actors are involved, what are their relations, roles, authority, how do creative processes work, how do ideas, styles travel? The developing field of 'production studies', a recent offspring in the field of film/audiovisual studies, holds promise here. The growing room for empirical studies in various other disciplines such as music studies will yield useful insights too. What complicates matters immensely is that the entire copyright system leans strongly towards generalised norms for a broad range of cultural production types and practices, using 'creative' effort as a catch-all. It is non-discriminatory in that sense. Still, the transition to digital humanities might lead to just the mix of in-depth analysis of individual instances of production and trend studies that would allow enriched legal reasoning.

Notes

1. The project Of Authorship and Originality was financially supported by the HERA Joint Research Programme (www.heranet.info) which is co-funded by AHRC, AKA, DASTI, ETF, FNR, FWF, HAZU, IRCHSS, MHEST, NWO, RANNIS, RCN, VR and the European Community FP7 2007–-2013, under the Socio-economic Sciences and Humanities programme.

2. In the arsenal of EU legislative instruments, 'directives' are laws that oblige EU Member States to adapt their internal law to meet the directive's legal norms. It is a result-oriented instrument, and is not necessarily aimed at achieving complete identical legal treatment of issues throughout the EU. A Directive might just set a minimum standard, or present a catalogue of options. For example, the Computer Programs Directive of 1991 obliges Member States to accord copyright protection to computer programmes as literary works at a unified originality standard, but leaves Member States the freedom to accord software producers additional protection under unfair competition law or other norms. Another example: the Information Society Directive (2001) contains a catalogue of some twenty permitted uses of copyrighted materials (limitations and exceptions), but only one of them is mandatory for all Member States.

3. Where two dates are given for Directives, the first is for the year in which a directive was first adopted, and the second for the latest version. Substantial changes normally result in a new directive that replaces rather than revises its predecessor.

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