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Copyright and Cultural Policy for the Creative Industries[1]

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Abstract

Copyright, which was initially introduced for the encouragement of authors of literary and artistic works, is not able to offer artists sufficient economic incentive to create. Royalty payments to all but the top artists are typically small and firms in the creative industries are typically large, making for a very unequal bargaining situation. Already, though, digital delivery of cultural products is beginning to change this scenario and we can consider possible effects on markets and the implications for copyright and cultural policy.

Copyright and Cultural Policy for the Creative Industries

Introduction

To most economists, the term Intellectual Property (IP) has been until recently largely synonymous with patents, whose economic effects are studied in the context of innovation, technical progress and growth. Copyright and the creative industries in which it is crucially important have until lately attracted little attention. In this Chapter, I put the spotlight on copyright law in the creative industries that comprise the cultural sector, and on artists' labour markets. I therefore adopt an instrumental and empirical approach to copyright law, viewing it as an incentive to cultural production. In this chapter, I give a brief introduction to the economics of copyright and to the creative industries and then go on to discuss the impact of the digitalisation on incentives and rewards to creators in the creative industries and the implications for copyright and cultural policy, making a plea for more institutional and empirical analysis in this area.

Copyright Law

Copyright law was first enacted in England in 1709 with the Statute of Anne and gradually adopted in other countries. In the USA, the principle was embodied in the Constitution in 1776 and the first Federal Copyright Act was passed in 1790. It gives authors the right to exclude others from copying their work without permission, the so-called exclusive right of authorisation. The basic right conferred on the author is that of controlling or restricting the acts of copying, that is, reproducing the work, issuing copies to the public, performing the work in public, broadcasting it by wire or satellite and including the work in a cable programme, playing and showing the work in public and renting or lending it to the public. The threshold requirement for copyrightable works is originality. However, independent creation is allowed by the scope of copyright law but it is subject to limitations and exceptions; the fair use exception is discussed in the next section.

Copyright in what is now called the Anglo Saxon tradition is essentially conceived of as an economic right that enables trade to take place in information goods. From the start, it applied to publishers as well as to authors. In Continental European countries, influenced by the Kantian concept of the author, copyright is an author's right (*droit d'auteur)* attached to the personality of the author; it embodies *droit morale*, what are now called moral rights, the right to attribution, integrity, disclosure and withdrawal, and these rights are inalienable. The

underlying rationale for this concept of copyright is natural justice rather than to facilitate transactions. With the globalisation of the cultural industries and increasing standardisation of copyright worldwide, however, the distinction between the civil law countries' emphasis on moral rights and copyright in the common law tradition is eroding. Moral rights have been incorporated into Anglo-Saxon law and European countries have extended copyright to neighbouring rights (rights neighbouring on copyright) to performers and to firms producing information goods. In Anglo Saxon law, statutory rights such as performers' property rights are also called neighbouring rights. For the sake of convenience (and at the risk of offending European lawyers), I shall refer throughout this paper to copyright in a generic way to cover both authors' and neighbouring rights and in the discussion below of the creative industries, to authors and performers as creators.

Copyright applies to a wide range of literary, dramatic, musical and artistic works in various media, such as films, recordings, broadcasts, computer software and the like. It does not require any proven artistic or innovative merit and accepts authorship on the basis of creative effort; thus arrangements, compilations, listings, databases, etc. are protected by copyright separately from the original material embodied in them. The author may license, assign or sell these rights outright or in part or transfer them to an agent; only the author's moral right in the work may not be sold or transferred. As techniques for reproducing and copying creative work have developed and the hardware for applying them has become cheaper, making it possible for the average household to own several copying devices (aural and video tape recorders, photocopiers, computers), the scope and degree of protection of copyright law has increased. In addition, changes in social attitudes to creativity and 'high' and 'low' culture and to the status of artists have led to extensions of copyright law, such as *droit de suite* for visual artists (artists' resale rights)[2] and performers' rights. As to the administration of copyright, royalties for sales and other primary use are usually administered by the publisher; remuneration for secondary use, such as photocopying and public performance of recorded works, is licensed by co-operative collecting societies (see Towse, 2001a).

Economic Features of Copyright

In general, the economic case for copyright for author is the same as that for patents for inventors: it creates statutory property rights that overcome free-riding problems of information goods and therefore provides an incentive mechanism for rewarding creators and for the

disclosure of their works. While patents protect ideas, however, copyright protects only the expression of ideas (works), which must be fixed in some form (written down, recorded, filmed, electronically stored, etc.) to be eligible. Works by literary authors, visual artists, composers, choreographers, film-makers, performers, and so on, in all media are protected by copyright law, as well as those by publishers, record, broadcasting and film companies and the like. Copyright confers a monopoly to the copyright-holder of 70 years after the death of the author (or that of the last surviving one in the case of joint authorship) and 50 years from the date of fixation in the case of a sound recording, broadcast or the like; this monopoly applies work by work. This is now the case throughout the European Free Trade Area and in North America (and elsewhere), following various harmonisation policies (see Towse and Holzhauer, 2002). Both patents and copyrights are monopolies but copyright is a much weaker monopoly and is more of the nature in economic terms of a Chamberlinian monopolistic good.

Landes and Posner (1989) provide a definitive economic analysis of the doctrines of copyright law. One of these, fair use, is particularly important to the discussion in this chapter; indeed, through legal cases like Napster, it has shot into the news. The rationale of fair use doctrine lies in the public interest in balancing the incentive to create that copyright provides with that of ensuring users' access to the works that are created. The exclusive right of authorisation is therefore limited in copyright statutes and exceptions made for certain types of 'fair use' - the use of copyrighted material by consumers and producers (authors and publishers) without the author's consent and without payment. With the advent of cheap office- or home-based copying devices, such as photocopiers, home video recorders, DVD and MP3, unauthorised use by consumers has increased considerably, some of which is fair use but much of which is illegal. Fair use also influences creativity; ‘standing on the shoulders of giants’ is a familiar phrase to patent analysts but the equivalent concept in relation to copyright is not so well known. Fair use doctrine recognises, notwithstanding the Romantic view of creativity, that most new works are derived from existing material in some way or another – through inspiration, reference, imitation, shared language and cultural values etc. Therefore, the problem copyright law has is to find a balance for creators between giving them access to protected extant work without excessive transaction costs and royalty payments and providing an incentive to create new works; this balance is sought by fair use. As Landes and Posner demonstrate, a too strong copyright regime that tolerated little fair use would raise transaction costs and copyright-based earnings, transferring rents to creators from users; it would, however, raise the costs of creation. A too weak regime, on the other hand, would not provide

sufficient incentives to look for means of charging and therefore would reduce transaction costs and earnings but would ease what Landes and Posner called 'productive' (as compared to 'reproductive') fair use of copyright In economic terms, fair use can be justified by the transaction costs of obtaining authorisation for each and every use of copyrighted material. Markets may not develop if transaction costs exceeding the value of copies to individual users (possibly the case with online music delivery).

In the creative industries, notably music, the market is served by private collective copyright organisations, collecting societies, that use blanket licensing to reduce costs of individual transactions; in other areas, such as administering public lending rights and photocopying charges, governments are involved often using compulsory licensing. The problems that these copyright collecting arrangements overcome are the cost and bother to individual authors, publishers and users of clearing and paying for the use of copyright material and that of enforcing copyright in private homes and offices where infringement, often on a large scale, takes place. Collecting societies are particularly important for licensing secondary use of copyright material, where 'third parties' are involved – those not a party to contracts between authors and publishers. Secondary use of recorded music in public performance in broadcasting and as an ancillary service by a large number of private enterprises (hotels, restaurants, shops, aircraft, discos, sports halls - to name a few) and of printed matter for photocopying is very widespread and collecting societies' revenues run to millions of dollars (see Towse, 2001a; 2002). As we see later, digitalisation may or may not exacerbate these problems.

The Creative Industries

From the above discussion, it can be seen that the main forum for the application of copyright law in practice is in the creative industries. The term creative industries is new, though the industries it covers are not. It seems to be a British invention that parcels together what were previously known as the arts ('high' culture) and the cultural industries (mass produced 'low' culture). There is a certain amount of semantic confusion here, as with terms such as the 'Information Age', the 'Digital Age', the 'New Economy', and the 'Creative Economy'. To make matters worse, it is sometimes necessary to distinguish between the creative industries (the whole cultural sector) with the cultural industries (those which mass produce 'recorded' cultural products).

The creative industries have come to be defined in a number of countries as the 'traditional' creative and performing arts (visual arts, literature, music, dance, opera, drama) and the cultural industries (film, radio, television, sound recording, publishing, multi-media). In most countries the arts and heritage are supported by some form of government intervention, whether state provision, government subsidy or indirect support via tax breaks and the like, depending on cultural policy. The cultural industries too may be publicly or privately owned, subsidised, assisted through the tax system and, in the case of the press and broadcasting, regulated. There is considerable divergence of practice on this in different countries (Towse, 2001a). Other industries that are entirely private, such as fashion, advertising and computer software, depend strongly on creative input (by people we call artists) and they have come to be regarded as part of the 'creative' industries as well. Whatever we call it, this is a development of and reflects the increasing significance in post-industrial economies of intangible production (the stage of human capitalism, to use Granstrand's (2000) term). What is important is that in all these industries producers rely upon copyright law to establish property rights and protect revenues and this has therefore become a unifying feature of the creative industries. At their core is creativity protected by copyright. This recognition has lead in some countries to viewing copyright as the basis for official definition of the creative industries.

It is only recently that the economic importance of the creative industries has been recognised. This recognition came about in two ways: one, when estimates were made of the economic size of the cultural sector, under the heading of the economic impact of the arts; the second was a similar exercise in social accounting, the measurement of the economic effect of copyright protection. The task has been a difficult one as National Income statistics do not classify the creative industries as such. It is even more difficult to make international comparisons and estimates should be taken with a liberal pinch of salt (Towse 2001a). Nevertheless, the figures are interesting. As can be seen from Table 1, the items listed there are ones covered by copyright.

Table 1 here

The identification of copyright and the creative industries has certain policy implications. Policy on copyright implicitly becomes part of cultural policy though the full implications of this are not always recognised. That is the case in the UK. The broader approach to cultural policy has brought the arts and the cultural industries together under the remit of the Department for Culture, Media and Sport (DCMS). The cultural industries were transferred to DCMS from the Department of Trade and Industry (DTI), which previously was responsible for policy in the commercial cultural industries. Copyright, however, is still dealt with by the Patent Office under the DTI. In the Netherlands, by contrast, there is not the same emphasis as in the UK on the cultural industries having common cause with the traditional subsidised arts and copyright policy is divorced from cultural policy, being handled by the Ministry of Justice and though it is clear from policy statements of the Ministry of Education, Culture and Science that copyright is regarded as important for cultural policy, the two tend to be viewed as separate entities. In Australia, however, matters have been taken further with the formation of the Department of Communications, Information Technology and the Arts, which is responsible for copyright as well as for cultural policy. This could become the model for copyright policy in other countries.

Economics of the Creative Industries

Most people associate creativity with the arts. Creativity is also central to the cultural industries and studies of artists' labour markets have shown that many artists work in them. I do not attempt to define creativity here (for a brief survey, see Howkins, 2001); suffice it to say that it leads the economist into uncharted territory of what is art and who is an artist. Most cultural economists have avoided the issue (as with tastes) and to rely on self-definition or on social statisticians who draw up questionnaires for labour market and occupational surveys. Another approach, which I favour, is to take the implied stance of copyright law – anything that is original for the purposes of copyright is creative. As indicated earlier, this does not imply a very high threshold of artistic creation.

Creativity plays the equivalent role in the creative industries to that of innovation in other sectors of the economy. Just as firms in manufacturing have outlays on research and development (R&D), so firms in the creative industries search for new ideas and talented workers to supply them. And, as with innovation, we may distinguish product and process innovation. New products are very important in the cultural industries, with a stream of novelty being demanded and supplied. It is misleading, however, to focus only on product innovation

because there has been enormous process innovation in the creative industries as well. Indeed, the cultural industries are the product of technical developments - sound recording, film, video, television and computers. The Internet and digitalisation are now beginning to have a considerable impact on the creative industries. As with all technological revolutions, these changes have altered the pattern of demand for workers, reducing the employment in the cultural sector of some types of artists and increasing it for others. They also have implications for the location of industry. The post-industrial economy has been called the 'weightless economy' and the creative industries epitomise that tag. If we were to apply Weberian location analysis to this sector, we would think of the 'weight' now being at the consumer downloading end, rather than packaging the content for delivery in tangible form – you supply the paper to print my articles, not I! (Indeed, paper may soon no longer be a necessity for reading if e-publishing develops).

Features common to all the creative industries are high set-up costs for content and low/negligible marginal costs of delivery (Shapiro and Varian, 1999; Acheson and Maule, 1999). These are the classic economic characteristics of natural monopolies. These features are responsible, at least in an analogue environment, for market concentration into an oligopolistic industrial structure with a few large firms dominating the industries (Disney, Sony, Seagram, Time Warner, to name a few international conglomerates; for a detailed analysis, see Bettig, 1998). We also observe tacit price fixing (the price of CDs has been investigated by the UK anti trust body, the Monopolies and Mergers Commission). Another feature is the tolerance of small independent companies in these oligopolised industries. It seems they are necessary to the large corporations as a source of artistic R&D (in the music business this is known as A&R – Artists and Repertoire) because large, bureaucratic organisations apparently lack the ability to talent spot at an early stage.

A second feature of creativity that has an economic interest is the incessant search for novelty and uncertain demand on the part of consumers, making the creative industries highly risky: 'nobody knows' is how Caves characterises them (Caves, 2000). In my opinion, this ought to be revised to 'some people know more than others' – that individual creators who supply the novel content face radical uncertainty, whereas the firms in the creative industries 'know more'. Firms can pool risk by holding a portfolio of copyright assets of different ages and riskiness and have access to capital markets; individual creators can rarely do either. Thus there is an inherent asymmetry between creators and firms and that is unintentionally exacerbated by

copyright law, which not only establishes property rights but also creates assets – a case of unintended consequences. Those consequences are a matter of concern for both cultural and copyright policy. These points are developed later in the chapter.

An aspect of this new economy and its dependence on copyright that has attracted less attention from economists is that risk-bearing is reallocated. This is most easily seen in relation to royalty payments for copyright. Under typical present arrangements of publication, creators and publishers share risk in a royalty arrangement, with the creator typically bearing the fixed costs of creating the primary content (writing the book or music, acquiring the necessary human capital etc). But though the fixed cost of creation is relatively high, it is difficult for the vast majority of artists to earn an adequate income. Firms in the creative industries are able to 'free-ride' on the willingness of artists to create and the structure of artists' labour markets, characterised by short term working practices and oversupply, make it hard for artists to appropriate rewards.

The complex interaction of copyright and artists' labour markets and the incentives and rewards to creators are explored in detail in Towse (2001a). Here, I use some results of that work as the basis for a further enquiry, the reward of creators (or artists; the workers responsible for creativity) as digitalisation advances. In order to make this case, it is necessary to start with a brief analysis of what cultural economists have had to say about artists' labour markets.

Economics of artists' labour markets

Cultural economics has developed over the last 30 years as a sub-discipline of economics analysing markets for the arts, heritage and the cultural industries[3]. A central area of interest in cultural economics has been the study of artists' labour markets, the response by artists (meaning all kind of creative and performing artists and craftspeople) to earnings, and the mirror image, the role of artists' labour costs in cultural production. The latter featured in the analysis of Baumol's 'Cost Disease', which attributed the increasing costs of producing the arts (and other labour-intensive service industries) to the limited scope for growth in labour productivity, causing the prices of artistic products to rise above the general price level; thus markets would be increasingly unable to support high quality art.[4] This widely accepted argument throws the spotlight on artists' incomes and labour markets and on artists' supply behaviour and that has given rise to empirical studies of artists' employment, earnings and

career development. Work is difficult in this area because there are so few official statistics (also the case with the creative industries), thus researchers have had to rely on surveys, which are not always satisfactory. In particular, it is difficult to deal with problems of defining artists (or creative workers); often researchers have to rely upon self definition rather than on a 'market' test of success. Nevertheless, there is now a body of work that allows some generalisations about artists' labour market behaviour and experience (Towse 2001a).

The distribution of artists' incomes is highly skewed with a few superstars having very high incomes from fees, sales and royalties. Research in a number of countries has shown that the 'typical' (that is, non-superstar) artist is a multiple job-holder, working longer than average hours in arts and non-arts work on short term contracts with no career structure and earning a variable and lower than average income, despite being highly educated. One of the results that is of particular interest in the present context is that many artists work in both 'high' culture subsidised organisations and with commercial 'low' culture firms in the creative industries. With respect to supply behaviour, artists respond to increases in income from both arts and non-arts work by spending more time on their chosen art form. The elasticity of artists' labour supply to rewards is important for cultural policy as the creativity and talent of artists are at the root of arts provision; thus understanding incentives to artists, whether pecuniary or non-pecuniary, is necessary to achieve policy objectives of innovation and high quality art.[5]

Copyright plays a role in artists' labour markets by protecting property rights to artistic creation and by providing both a financial incentive in the form of royalty earnings and a non-pecuniary incentive through moral rights and the recognition of artistic status. But while copyright law creates rights, it cannot guarantee rewards, notwithstanding the rhetoric of lawyers and artists' organisations; the value of copyright royalty rates is decided in the marketplace and it is therefore artists' bargaining power with firms in the creative industries determines copyright earnings. Artists' bargaining power is, however, considerably weakened by the persistence of excess supply of creative workers to the creative industries. That is one of the universal findings of research on artists' labour markets. As with artists' earnings from other arts sources, the individual distribution of copyright earnings is highly skewed with a few top stars earning considerable sums but the median or 'typical' author earning only small amounts from their various rights.

Cultural economists explain general oversupply in the creative industries in terms of inherent radical uncertainty. A derivative of Caves' 'nobody knows' theorem is that there is oversupply in the creative industries. As in Nature, so in art: all forms of life produce millions of seeds and eggs, far in excess of the amount needed to reproduce the present population, in order to ensure the continuation of the species under conditions of uncertainty. The comparable phenomenon in art is overabundance of trainees in all the creative and performing arts and of trained artists trying to make it professionally. Unsurprisingly this leads to two related phenomena (which Adam Smith observed in the legal profession of his day – 'the lottery of the law', as he called it in the *Wealth of Nations* Book 1) – very low rewards to the majority of those who work in these industries and very high rewards to the few, whom we nowadays call superstars. It is radical uncertainty that drives this lottery; 'no-one knows' so they latch on to the famous to provide information about quality. The internal dynamic is that the chance of success is a lure to risk-taking artists, who flock to take their chances. The result is a highly skewed distribution of income.

Digitalisation, copyright and rewards in the creative industries

The foregoing analysis has set the scene for considering the effects of digitalisation in the creative industries. If digitalisation is a threat to copyright, a question that at present has considerable importance for lawyers and economists as well as for those whose livelihood depends upon it, nowhere will it have greater impact than in the creative industries. Throughout its 300 years' history, copyright has adapted to technological change while retaining essentially the same legal and economic principles. The very origins of copyright are tied up with the technical ability to copy, as illustrated in the clever title of Goldstein's 1998 book *Copyright's Highway: from Gutenburg to the Celestial Jukebox.* Until digitalisation, however, copies of most types of art products were inferior to the original; with digital copying, it is only a figure of speech to make a distinction between the original and copies in relation to some products - printing and recorded music being prime examples. Works in many media can easily be reduced to a digital signal and, with existing technology, delivered through telephone lines and fibre optic cable to home-based computers, by satellite if distances are great; developing broadband technologies promise far more. Thus works of art and entertainment, as well as a host of more mundane services, become 'content' to be delivered, along with the take-away dinner, on demand. This presents a challenge to legal analysts and to economists as to how these services can be charged for, as, unlike the dinner, there is no physical product that can be withdrawn upon non-payment.

It may be that these developments present a greater challenge to firms in the creative industries than they do to the artists and other creators of content. Indeed, they have empowered some artists to free themselves from dependence on publishers for the marketing of their products, enabling them to retain effective control over their IP. Some professional pop groups and stars have already taken advantage of this turn of events. Thousands of *wannabees* are vanity publishing in all media on the Internet. It will be interesting to observe the changing role of literary publishing, film, TV and radio companies in the Information Age. To survive, they will almost certainly have to follow the example of music publishers, who, with the advent of computer programmes for music printing, changed to handling rights rather than copy.

Such technical developments call for new ways of organising markets in the creative industries: the development of e commerce, which will lead to changes in the industrial organisation of the supply of content and delivery; a switch to far more licensing/franchising arrangements as a substitute for outright sales; and more market segmentation as price discrimination becomes easier with e commerce.

E commerce will clearly alter the costs of production. Take the case of books: even a simple e mail ordering system such as that of Amazon Books removes the need for shops on high street locations and transport to them; substitutes are warehouses on cheap land with postal delivery. There are still costs of printing and paper. But when books and other reading material are downloaded from the Internet, the customer pays for the paper and the printing and the publisher markets the list and administers the copyrights; when authors learn how to market or new firms develop providing information services about authors and their output, there is no need for publishers in their present role.

It is easy to see from the above that rights management is likely to become more and more important for content delivery. Whereas the older literature on the economics of copyright considered the welfare case for its existence, the recent literature deals with issues such as automated rights management (Bell, 1998) and licensing fees[6]. The choice of trading methods – sales, licensing, franchising, to name the obvious possibilities – become the digital marketplace equivalent of the 'make or buy' decision of firms, which determine the structure of industries. The different pricing procedures of these ways of doing business are a new application of modern price theory. Moreover, new sources of revenue become possible;

Meurer (1997) explores price discrimination and fair use with respect to digital works, arguing that digitalisation may encourage the demand for excerpts of copyright material, for example, for creating multimedia products, and revenues could accordingly rise. This would make the formation of digital collecting societies economically feasible and enable copyright-holders to charge even small amounts and so cut down the amount of 'free' use, which would inevitably result if no mechanism for charging exists.

Although there is a lot of pessimism in some industries, especially the film and music industries, about the feasibility of charging for Internet delivery, the bottom line is 'there has to be some way of arranging payment': where there is effective demand for information content – and we know that people are even willing to pay a price for material they can download from the Internet – there must be some method of payment that makes it happen. Indeed, the developments in the music industry since the Napster case point in that direction.

It is now well understood that online delivery facilitates greater opportunities for price discrimination, which increases revenues. There is a variety of market and non-market price regimes, each with a different set of incentives and rewards to economic agents on the supply side and to consumers of products containing copyright material on the demand side. The question is how much of this is reaped as reward by creators of content and how much accrues to the firms in the creative industries.

The creative industries, in fact, offer a wide range of reward systems for copyright owners. They suggest a variety of ways in which payment may be made for content supplied via new delivery channels. At present, the following methods of payment are to be found in the cultural industries:

- spot prices charged to consumers (users) by producers; first sale doctrine allows the consumer freedom to enjoy use (e.g. to share or resell) indefinitely but copyright law restricts copying;
- discriminatory spot prices charged to consumers;
- spot prices paid to the creator for unlimited use of specific copyright material (buy-out);
- flat rate licences to users for specified uses of copyright material for a limited time period;
- licences to users for metered use of specific copyright material;

- future payments - royalties (a percentage of revenues) to copyright-owners based on sales;
- present payments of future prices paid to creators of copyrighted work, e.g. advances on royalties;
- profit-sharing between copyright-owners, such as star performers' and directors' shares in musicals and films;
- flat-rate share of revenues between copyright-owners, such as those from blanket licences issued by copyright collectives for unlimited use;
- pro-rata share of revenues between different copyright-owners based on itemised uses of material, e.g. licence income from the public performance sound recordings, which is shared between composers, performers and record companies;
- legal enforcement of the share of resale value, e.g. *droit de suite* for visual artists;
- site licence model i.e. blanket licences for unlimited use of a bundle of copyrights negotiated between owners and organisations on behalf of multiple users, such as software licences for business employees/university members; photocopying licences;
- state regulation of contractual licensing arrangements, as above; for example, regulation of music and photocopying licences by the Copyright Tribunal in the UK;
- compulsory licences with equitable remuneration for some purposes embodied in copyright law, as with performers' rights in the public performance of sound recordings;
- compulsory licences organised by the state, e.g. state-controlled TV licences;
- state-organised collection and distribution of remuneration for copyright-owners, for example, the UK Public Lending Right;
- replacement of prices by taxes as compensation for use, for example, the blank tape levy.

This list is not intended to be comprehensive but rather to suggest that there are many ways of organising transactions. All these methods of payment and reward are currently in operation and they are models that may be applied to digital delivery in one way or another. As Granstrand has suggested, where excludability problems cannot be solved for a particular item, bundling non- excludable with excludable elements would be a solution (Granstrand, 2000). Markets have proved to be capable of resolving such problems. However, as may be seen from the list above, some arrangements can be made by contracts between buyers and seller, whereas

others rely on institutional arrangements, such as collectives, government agencies and copyright law.

What is particularly interesting for economists is whether the 'new' price system will emerge spontaneously or whether, as, for example with photocopying, it needs to be engineered by a government agency. Markets can find a way, for example, they solved the incredibly complex problem of administering music royalties by setting up private, co-operative collecting societies, and that suggests that artists and other creators will be paid for creating content in new media.[7] In order to better understand these issues, economists need to do detailed institutional analysis of the pricing and administration of copyrights to assess the role of copyright law in assisting, rather than replacing the market, the option that seems to be favoured by lawyers.

Policy-makers sometimes assume that the market cannot do the job and should be replaced. An instance of the tendency of law-makers to come up with non-market legal solutions to perceived problems is the 1992 EU Rental Directive, which laid down that certain rights be made unwaivable. That is the case with visual artists' right to *droit de suite* and some performers' rights, for example rental rights and the entitlement to equitable remuneration for the public performance of sound recording (think of radio play of a CD). The last-named right requires that a pro rata payment for each individual performer's contribution track-by-track on a CD be 'fairly' compensated for public performance. What this piece of law-making expressly forbade was the payment of a flat rate fee for the artists' services that bought-out their future rights – what I called above, in line with music industry practice, a buy-out. This assumes two things: one, that, a buy-out cannot be 'fair', that is, actuarily equivalent to the present value of a stream of future royalty payments[8]; secondly, that artists have a preference for risk-taking by being tied in with the publisher in a royalty deal rather than being paid a certain price upfront. However, it ignored the transaction costs of such a move, which can easily exceed the payment due to most performers. This was a case of applying legal principles regardless of potential market incentives and outcomes. The problem this legislation attempted to tackle was the uneven bargaining power between creators and firms in the creative industries but legal solutions are not appropriate; markets always find a way round them, for example, by discounting future calls on rewards and reducing present payments. This has been the experience of the *droit de suite*, which though unwaivable and inalienable, is frequently not exercised by artists.

The vastly stronger bargaining position of these firms is rooted in the economies of scale and scope and network economies of the creative industries, which has lead to large oligopolies and, by contrast, weak organisation of creative and performing artists in highly competitive labour markets characterised by patterns of short term employment and casualisation[9]. However, what we do not yet know is what the market structure of the creative industries in the digital age will be. This is something that economists should address. It seems likely that the primary creative content-providers will still be individual artists and small start-ups while the firms that deliver information goods to markets could grow ever bigger. But there is no inherent reason why in the changed circumstances of the digital era, firms that deliver content should not more highly reward those creating it by a range of new payment methods. If content is in shorter supply than delivery channels, we would expect that result.

Copyright as an asset

The asymmetry of market power between artist/creator and publisher/firm in the cultural industries is further exacerbated by the role of copyright in turning a work of art into a durable asset long out of the control of the original author – the unintended consequence of copyright law mentioned above. This process could not happen without the requisite copying technology, such as sound recording and photocopying, but once that is in place, copyright magnifies the effect on artists' labour markets. Indeed, I would argue that copyright has enabled mergers to take place in the cultural industries through this asset-creating role. These mergers are currently about delivery buying up the rights to content. This effect of copyright is a result of the frequently-held idea that 'strengthening copyright' means increasing its duration and scope. The longer copyright lasts, the greater the chance that the market for the work will change in ways that could not be predicted at the time of the original contract. We have seen this with back catalogue of films, TV programmes and sound recordings, for which new delivery techniques and exploitation of markets worldwide have provided a large demand. Economists usually argue that such unpredictable events lead to losers as well as winners. The point is that the winners are assisted by copyright law in their gains. These are not assets traded in a free market but ones that get pure economic rent from statutorily created property rights.

Access to capital markets is another crucial feature of asymmetry between creators and firms in the creative industries. Large firms have the ability to obtain capital and to pool risks by holding a broad portfolio of assets (for example, Seagram. See Bettig, 1996). By contrast,

creators initially have only their human capital as collateral. Having copyright on your works does not help if you have to sell it to finance basic living costs.

Copyright policy and cultural policy

The earlier discussion of copyright law stressed the problems for striking a balance between the strength of protection for authors and publishers and the effect on the circulation of information for citizens and also for other creators. The scope and breadth of copyright law, from the economic point of view, weighs up the costs and benefits of incentives and rewards and transaction costs. It is also the case that copyright law has become a means of regulating the uneven bargaining position between individual creators and the firms in the creative industries who hire them. These aspects of copyright law make it important of cultural policy.

Various solutions have been suggested to strengthen the position of artists: strengthening copyright to enable creators to trade on the open market; state organisation of royalty and other copyright payments so the state bears the transaction costs; state grants to artists and other creators, which reduce the necessity for them to sell their work cheaply; state-organised capital loan schemes to enable artists to exploit their works themselves; state-organised loan guarantee schemes combined with private finance (like the US student loan scheme); competitions and prizes to reward successful creators. The first solution, as I argued above, has the opposite of the desired effect as it increases the asset value of copyrights and thus the tendency to oligopolisation of firms in the creative industries; the second has resulted in very high transaction costs in those countries where it has been adopted; and the remainder are essentially means of rewarding individual creators as an *alternative* to copyright law.

There is one superior policy, however, which is to reduce the term of a copyright to 15 - 20 years and make it renewable so that the market can revalue copyrights. This suggestion was put forward by Plant (1934) and was been proposed by, among others, the International Managers' Federation, the pop group managers' interest group, to the UK Monopolies and Mergers Commission (MMC as it was called at the time) in their submission to the enquiry on the Performing Rights Society monopoly (MMC, 1996). The copyright (or neighbouring right) would revert to the original creator who could therefore capture its current market value during her lifetime as well as being able to benefit descendants.

Summary and conclusions

As with patents, economists have queried the case for copyright as a necessary system for incentive and reward and have questioned its economic consequences. Plant, for example, thought that copyright encourages moral hazard in publishers (firms in the creative industries) without sufficiently rewarding authors (creators) who supply the creative input. He believed that the publishers could rely on the temporary monopoly of lead time to establish new products on the market. Although the development of copying technologies has considerably reduced lead time as an effective business strategy in the creative industries, it nevertheless still has a role to play (because 'nobody knows'). As to moral hazard, it is now accepted that over-reliance on copyright protection on the part of the creative industries (as witnessed by heavily financed anti-piracy campaigns nationally and internationally via the World Trade Organisation, World Intellectual Property Organisation and the like) has reduced their incentive to adopt new technologies, for example by developing legal digital downloading of cultural products.

The current debate about copyright is not whether or not it should exist but if it will work with digitalisation. This is a debate in which economists should have a strong voice. It is not only a matter of legal principle but also of economic pragmatism The creative industries, those most likely to be affected by digitalisation, have evolved a range of pricing methods and strategies for organising the delivery of creative content to the market; they need the incentive of contestability to continue to do this. These topics merit further study by economists in order to anticipate the effects of digitalisation and of changes to copyright law on industrial organisation and on artists' labour markets. The most serious problem of copyright policy is an economic one – the tendency to oligopoly in the creative industries. For copyrights not only reduce competition they appear also to encourage mergers of firms based on copyright assets (for example, the AOL/Time Warner merger [10]). This has important consequences for cultural policy and as a result, I believe that copyright policy (so often in the hands of lawyers) should explicitly take cultural issues into consideration. It can be argued that that is the purpose of fair use doctrine but that is particularly under threat from digitalisation. And although the economists' approach to fair use emphasises the balance of costs and benefits, this is at bottom an empirical question but little empirical work has been done on copyright at all.

The empirical work that has been done is in the context of artists' labour markets, looking at the distribution of artists' earnings from copyright and other sources (royalties appear to

contribute very little to the 'ordinary' artist's income). In artists' labour markets there is also a tendency to concentration – the superstar phenomenon. The selection of superstars, however, relies upon a pool of artists (creators) and encourages oversupply with the result that rewards are depressed. Creators often work alone or in small 'craft' firms and, though their work is protected by copyright when it is sold on, these small operators are very vulnerable to economic pressures, reflecting the uneven bargaining power with purchasers in the creative industries. The vicious circle, however, is that strengthening and extending copyright does not solve the problem, it may indeed exacerbate it. Thus copyright policy cannot alone solve this problem. It is a matter for cultural policy too. Thus work by cultural economists versed in copyright law and its administration and in industrial organisation in the creative industries is needed to streamline copyright and cultural policy.

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1 An earlier version of this paper was presented at the Seoul International Conference Cultural Industries in the Information Age in Korea in November, 2000 and also at the EUNIP Conference in Tilburg, the Netherlands in December, 2000.

[2] The right of the artist to a share of the increase in value of her work of art in subsequent sales (usually public auctions). The *droite de suite* was established in France and spread to many European countries and to their dominions. At the time of writing, *droit de suite* was part of the European Union harmonisation programme and was due to be introduced into countries where it had not formerly existed – among them UK, Ireland and the Netherlands

[3] See Towse (1997) for a collection of articles in the field.

[4] See Towse (1998) for the collected works of Baumol in this and related areas.

[5] See Towse (2001b).

[6] For applied studies of both legal and economics aspects of copyright, see a collection of conference papers in Towse (2002).

[7] In the UK there are over 20 such societies and the number increases all the time as new rights and sources of royalty income are created.

[8] This may be the case, however, for other economic reasons; see Towse (2001a).

[9] See, for example Caves, 2000on the effects in the film industry of the demise of the Hollywood studio system.

[10] At the time of writing, several mergers of content and delivery firms were underway: AOL/Time Warner was agreed and Bertlesmann/Napster and Vivendi/MP3 were being discussed.

Table 1 Global Creative Industries
1999 market size, in US $ billions

	Global	US	UK
Advertising	45	20	8
Architecture	40	17	2
Art	9	4	3
Crafts	20	2	1
Design	140	50	27
Fashion	12	5	1
Film	57	17	3
Music	70	25	6
Performing Arts	40	7	2
Publishing	506	137	16
R&D	345	243	21
Software[2]	489	325	56
Toys and Games	55	21	2
Television & Radio	195	82	8
Video Games	17	5	1
Total	2,240	960	157

Source: Howkins (2001)