

COPYRIGHT AND CREATIVITY: AN APPLICATION OF CULTURAL ECONOMICS

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ABSTRACT. This paper argues that the emphasis by policy-makers on creativity and economic growth in the creative industries, fostered by copyright law, is not well grounded and cultural economics gives little support for these policies.

1. INTRODUCTION

Look at the website of any Ministry of Culture and you will see that the world has suddenly discovered the economic power of creativity! Policies for the creative economy and creative industries are to be found in almost all developed and even in developing countries. Quite what is meant by creativity is not made clear and it is also far from clear how it can be encouraged by government policies. One of the most prevalent policies is strengthening copyright law (authors' rights) in the belief that this acts as an incentive to creative people to produce new works of art, music, literature etc. However, the power of copyright law to reward artists and other creators seems to be limited, while on the other hand it apparently provides disproportionate benefits to the large corporations that dominate the creative industries – the major film and record companies, printing and broadcasting corporations and the rest.

In this paper, I discuss the relationship between copyright and creativity in terms of what we know from cultural economics about artists – the primary creators: their economic motivation, earnings and employment. Cultural economics uses economic theories to investigate the cultural sector – the arts and heritage and, of increasing interest, the creative industries. What stimulates creativity by artists and how cultural production is organised is one of the topics studied by cultural economists. Increasingly, the role of copyright law is being taken into account but there is far more work that needs to be done on understanding whether, as claimed, it does in fact protect creators and encourage creativity. Just claiming that it does so is not good enough – but that is actually all that policy-makers are doing.

Digitalisation of cultural products and their distribution via the Internet are having an impact on the way creators and the creative industries produce and market their goods and services. Property rights and licences to use creative work are becoming far more important in economic transactions and call for different ways of doing business. Undoubtedly, the creation of new work is a vital part of this world. But do we know how to create creativity? That question has to be

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answered if we are to believe that government policies can promote the creative economy and I do not think we know the answer.

2. THE CREATIVE ECONOMY

Creativity is one of those words that has become completely debased by overuse: anything and everything is apparently ‘creative’ nowadays – not just industries and the economy but also advertising, salesmanship, management consultancy – even accountancy! And of course, artists are creative but then so are children and according to UNESCO we are all creative. Overuse has rendered it devoid of meaning – so, is it even worth investigating, especially from the economic point of view?

The ‘creative economy’ has become a buzz word, a slogan, something that is unquestionably true. And it is easy to see why Ministries of Culture have embraced it so whole-heartedly: it empowers them to be in the forefront of the quest for economic growth, just as that other buzz word ‘the economic impact of the arts’ did 20 years ago. But Ministries of Economic Affairs are also on the bandwagon. If policies for the ‘creative economy’ and ‘creative industries’ are to be taken seriously (and governments all over the place have such policies), economists should be capable of analysing them, especially those of us who are cultural economists. Put simply: if the creative economy is such a good thing, can an economy be made more creative and if so, how? - do we know how to create creativity? Is it something that is amenable to social engineering? These questions have to be answered if we are to believe that government policies can promote the creative economy.

If you look at the policy statements of almost any government on the creative industries, for example, in the Netherlands or in the UK where all this started with Chris Smith’s 1998 Creative Britain, you will see that almost immediately creativity is mentioned, it is linked to copyright (or authors’ rights - I shall use the term copyright in the UK/US sense and just say that though there are important legal differences between copyright and European authors’ and neighbouring rights, much of the economic analysis of copyright applies to both traditions). However, there is some circularity here because the justification for copyright law is very frequently expressed in terms of its stimulus to creativity and assurance of rewards to authors and other creators.¹ The underlying justification for copyright is that creativity is good for economic growth and in the post-industrial economy, the creative industries – now defined in terms of dependence upon copyright – are growing faster and accounting for an increasing share of Gross Domestic Product. And while that is a fact, much hangs on the scope of copyright law and on how ‘dependence upon copyright’ is defined in the calculation of its contribution to the economy. Copyright is now supposed to be playing the same role in the ‘creative economy’ as patents did in the heyday of the manufacturing industries. The link between copyright, creativity and economic growth is made to seem a causal one but in fact, there is little evidence on which to base the assertion.

This is, of course, where cultural economics comes in and, as I shall argue, cultural economics does not just come in, it comes into its own. At the heart of the creative industries – and the list of these industries includes the live performing

¹These other creators now include performers, whose rights have recently become almost equal to those of authors, and stronger rights have been accorded to firms or companies in the creative industries in publishing, sound recording, film, broadcasting, games and so on.

arts, the visual arts and literature as well as the music, film and publishing industries and broadcasting – lies the creation of cultural content, without which these industries lose much of their economic as well as their cultural value. The interaction between art and economics is a central theme of cultural economics. This interaction has been discussed in two ways in cultural economics: in the study of artists' labour markets, in which artists' employment and earnings are analysed; and secondly, the interaction has been studied in terms of 'contracts between art and commerce', to use Richard Caves' words from his important book (Caves, 2000) *Creative Industries*, which analyses the relationship between artists (or creators) and the creative industries that market their work. So, cultural economics has a well established basis from which to analyse the creative economy.

3. ECONOMICS OF COPYRIGHT

Copyright law is a clever system for financing the creation of works of art, literature, music etc: by granting statutory property rights to creators, it makes it possible for them to charge for the use of their work. What distinguishes intellectual property (IP) from other types of property is that it can very easily be used or appropriated by others. It is a public good in the economic sense, meaning that it is non-rival (my consumption does not reduce the amount available to you) and it is non-excludable, meaning that its use cannot be prevented and therefore charged for. In an analogy with land, IP law can be seen as a type of 'enclosure' creating rights that privatise the use of inventions in the case of patents and of works of art in the case of copyright. By making it illegal to copy someone's copyright works without their permission ('authorisation'), authors can control the use their work. That control enables them, at least in principle, to charge a royalty for its use (the economic right) and to protect the type of use made of those works - the so-called moral rights. Thus, the legal protection of copyright law grants the creator a 'temporary' monopoly of her works (lasting 70 years after her death) that can be exploited through the market. In the inimitable words of Macaulay: 'Copyright is tax on readers for the purpose of providing a bounty for writers'. This is the basic economic principle of copyright law: it provides an incentive to creativity through the higher price that the grant of copyright protection makes possible. The monopoly revenues of the sales of works of art are the reward for creating them.

This rather simple exposition covers a host of complex matters that economists have studied and it is worth noting that as copyright has come more and more to the fore, other social scientists as well as economists have now invaded what was until about 20 years ago just a minor area of IP law for a few lawyers. Cheap and accessible copying technologies changed all that – photocopiers, video recorders, CD burners and now the Internet. It is also worth noting that economists from Jeremy Bentham onwards have consistently been copyright sceptics up until the 1980s (when these technologies started to spread) and there are still many who question its economic rationale. I cannot possibly summarise all aspects of the economics of copyright here so I confine myself to those that are relevant for my theme of copyright and creativity.²

Copyright finances the creation of works of art by charging users for the use they make of those works: the more popular the work, the greater the income it generates for the author and publisher. The higher the price that users can be made to pay,

²Two recent surveys summarise these issues: Liebowitz and Watt (2006) and Towse (2006a).

the greater the royalty the copyright holder. Though this and other aspects of the monopoly power of copyright holders are often deplored, that is precisely how the system is supposed to work, as Macaulay very well understood! And although in the cultural sector we are much more familiar with the use of subsidy by taxpayers to finance artistic production, in fact there are other schemes that work this way – the fixed book price raises the price of books to encourage book publishers and bookshops and the regulation of monuments makes owners pay for the upkeep of heritage buildings. It may well be said that this is a preferable method of finance to that by taxpayers – taxpayers have no choice how much is spent on the arts except through the ballot box, whereas these schemes allow users to finance their chosen cultural products.

However, there are some serious drawbacks to copyright: one is that it has become stronger over the years (especially recently) in the sense of lasting longer and having broader scope. This is partly justified as a response to what could be called ‘natural developments’ such as greater longevity of authors and technological developments in copying but it is also because copyright works are increasingly valuable, especially to large corporations. The sale by Michael Jackson of the Beatles’ song catalogue to Sony in May 2006 for an estimated \$1 billion is a demonstration of this point. One need not be an economist to see that the value of these assets would be increased if copyright becomes stronger and lasts longer. Many of the recent changes to copyright law are the result of pressure by US creative industry interests, which have the most to gain from them as the leading producers and exporters of cultural products in the world.

The increasing value of copyright works and the reliance of large corporations on copyright law for protection have created a situation in which changes to copyright law are heavily lobbied for. Governments (with the notable exception of France) have proved very amenable in their response – one could say they are the victims of their own hype. Having persuaded themselves that copyright is the key to creative economic development, they are now bombarded with demands for ever stronger copyright measures. Many lawyers (including Richard Posner, a US judge and author of the most widely read texts on the economics of copyright) as well as other academics are increasingly concerned about the public choice aspects of copyright law, of which this lobbying is part.

My contribution to the economics of copyright (Towse, 2001) has been to point out two things: one, that copyright law is not symmetric in its effects on the ‘author’ (the primary creator of content) and the ‘publisher’, the company in the creative industry that markets their work (record label, broadcaster, film studio, etc). Given that most authors (and we can also include performers) are not in a position to market their own work, they have to deal with publishers to get their work to market and these companies take a large share of the profits. Royalty payments and other remuneration from copyright take only a small share of revenues. Secondly, how much these companies charge for the creative products they sell is not regulated (except under competition law if they have a large market share), so the ‘tax’ they levy is up to them. The maxims of public finance tell us that a tax should be fair and efficient. Copyright can in fact be seen as a sort of social contract: ‘we the public agree to this law to ensure creative cultural development for the benefit of our grandchildren and the price we pay is that our cultural products cost more’. Many people feel this contract has been broken by the excessive government support

for the demands for ever stronger copyright law by the creative industries and the excessive share that they take of the spoils. This is leading many scholars from all disciplines to call for a halt to the apparently ceaseless onward march of copyright and even for an end to copyright.

4. COPYRIGHT AND CREATIVITY

Creativity is invoked in nearly every statement supporting the case for copyright law. For example:

“A vibrant, diverse creative sector is important to the UK both culturally and economically. Intellectual Property Rights have always been at the heart of our Creative Industries ... encouraging and rewarding creativity.....”. (UK Minister for the Arts in 2004).

This was part of the preparation for a European Creative Economy conference sponsored by the UK government for its European Union Presidency; it has been followed up by a similar event in Austria in March 2006. It is a certainly a high profile topic.

However, as cultural economists know from studies of artists' labour markets, the rewards to artistic creativity are generally pretty low and 'encouragement' through copyright is as likely to come from the recognition of the status of the artist and their moral rights as it is from the economic returns. There is actually very little empirical evidence on artists' earnings from copyright and the little evidence there is confirms what everyone knows anyway – that the superstars have high royalty earnings and the rest typically earn very little. In fact, the whole debate about the importance of copyright has always been conducted in an information vacuum as far as artists' rewards from it are concerned. Aggregate data on the contribution of the creative industries to the whole economy – the only empirical evidence that is bandied about – tells us nothing about the distribution of royalties and payments to artists.

Be that as it may, how relevant anyway are artists' earnings to the question of copyright encouraging creativity? Does creativity – whatever that means – respond to the stimulus of copyright-induced earnings? This question requires an understanding of artistic motivation and its response to monetary reward, a topic that has been studied in cultural economics by Bruno Frey(1999). He has adapted the theory of intrinsic and extrinsic motivation and reward to hypothesise that inappropriate matching of the two would lead to 'crowding out', so that, for example, an artist who is driven by inner motivation is not only *not* stimulated to produce work by monetary reward, but she is so to speak insulted by it. Incentive and reward must conform. Copyright (and especially authors' rights) offers artists recognition of their status and protection of their moral rights that enable them to control the use of their work even after they have had to part with the economic rights. Control of the artist's reputation and of the integrity of their works is an incentive to create. Thus, copyright law satisfies both intrinsic and extrinsic motivation and reward with its combination of moral and economic rights.

All told then, the case for copyright as an economic incentive encouraging the creation of works of art by *artists* is not strong. On the other hand, if by creativity is meant the industry side of the creative industries – the 'commerce' and not the 'art' in Caves' equation – then copyright law serves it very well. Copyright has

been broadened in scope and now includes the protection not just copyrights but also the means of protecting them from digital theft – the Technological Protection Measures (TPM) and Digital Rights Management (DRM) – and it has been extended from 50 to 70 years plus life for authors, to 50 years for performers and broadcasters, record labels etc in Europe and many other countries, and in the US to 95 years for company copyrights eg Disney Corporation.³ The UK government is now contemplating following suit with an extension to 95 years. Such a long duration of copyright is of far greater use to companies who can use copyrights as assets on the capital market than artists who cannot – another of the asymmetrical effects as between author and publisher I referred to earlier.

There is an irony here, though, for the topic of copyright and creativity: copyright protection is in fact a two edged sword. As Landes and Posner (1989) pointed out nearly 20 years ago in their seminal article on the economics of copyright, overly strong copyright inhibits creativity because it imposes higher costs on later generations of creators. Copyright law therefore has to find a balance between the incentive to create now and the access of later creators. It also imposes higher costs on consumers and reduces access due to the higher prices that copyright holders can charge – the demand for cultural products, just like other goods, is downward sloping. Studies by economists of so-called piracy have pointed out that overall welfare may be increased not reduced by unauthorised use and anyway, if copyright protection is too strong and prices too high, they encourage piracy.

I hope I have given a flavour of the complexity of these issues and their importance for cultural production and consumption. I have not even touched on the question of the effects of digitalisation on both copyright law and on the threats and opportunities scope it offers to creators. There is a whole other story about the administration of copyright through collecting societies, which, unlike the creative industries, are strongly regulated by the state in most countries. The use of DRM could on the one hand make control by copyright holders even stronger and lead to greater exploitation of the monopoly through price discrimination or it could alternatively, as argued by economists such as Varian (2005), provide an escape from copyright altogether if it were able to generate sufficient income for creators and the creative industries through the business models they adopt. Other economists have proposed the use of subsidies or prizes and awards as a way of encouraging and rewarding creators. There are alternatives to copyright.

5. ECONOMICS OF CREATIVITY

I now turn to another aspect of creativity and ask what do we actually know about the *economics* of creativity? After all, if governments are placing so much emphasis on creativity as an engine of economic growth, there must be some view of how its power can be harnessed. Unfortunately, however, we do not know very much about the economic aspects of creativity apart from research on artists' training.

The economics of education is relevant here. One of the big questions in the economics of education has been the role of innate ability and that, of course, has strong resonances for a discussion about creativity: is it nature or nurture? The question has fundamental implications for social policy: if the answer is nurture,

³It is worth reflecting on the fact that the first copyright law, the 1710 Statute of Anne in England, set the term for copyright at 14 years renewable for a further 14 years.

then success on the labour market and productivity can be enhanced by investment in schooling, resulting in human capital formation. On the other hand, if nature predominates, educational institutions just serve to screen out the innately better students. Since its introduction in the 1960s, the economics and sociology of education have both struggled to disentangle the relative influence of innate ability, family background and schooling on earnings and career success without a conclusive result (Towse, 2006b).

This problem seems to even more marked in artists' labour markets. Studies of artists' earnings have found that neither age, nor educational qualifications account for the distribution of artists' earnings and especially the fact that a very few superstars earn high incomes while the majority of artists barely can make ends meet. Superstar theories explain earnings differentials in terms of differences in talent but leave us with the problem of being unable to measure differences between individuals' innate endowment of talent. Success in the arts is not so much due to the investment in education but is instead the result of greater natural ability. Just as we apparently cannot make people like the arts by spending money on them, we also cannot create creativity by so doing. It seems that the best thing training institutions can do is to teach professional skills to talented students. Art education for school age children is probably even more important as it allows them to learn about themselves and their potential interest and ability. All this is surely bad news for those who believe that investment in training artists can create creativity and increase creative productivity in the economy. We simply do not know how to stimulate creativity.

6. CULTURAL ECONOMICS: A NEW AGENDA

As we have seen, cultural policy is increasingly emphasising creativity and copyright and the creative industries, without, in my opinion, having an established basis for understanding the dynamics of the growth process in these industries. Policy-makers are grabbing at straws as a guide to action in the absence of a causal theory. Cultural economics is capable of providing insights of the processes involved and of appropriate policy measures if it would re-orientate itself. Much of cultural economics at present is going over old ground; we know enough about subsidy and audiences – the problem is there is no political will to deal with these issues. Most people's cultural consumption is anyway unrelated to subsidy but all of it has to do with copyright and the creative industries.

Cultural economics needs to turn more of its attention to study creativity and copyright, including empirical studies of the effect of copyright on the consumption and production of cultural goods in both for profit and non profit organisations. Related to that is the question how firms in the creative industries exploit their copyrights entrepreneurially - how they gain control of markets by building their copyright assets, the role of copyrights in acquisition and mergers and the role of copyrights in international trade of creative goods. Cultural economics also needs to become more like business or industrial economics with the emphasis on creativity and innovation and on property rights over human capital. Contracting over copyrights is a topic that has hardly been investigated in cultural economics; we know from work by economists on property rights that there is no such thing as a complete contract. A complete contract would have to specify all aspects of the deal and that cannot be done. It is the *incompleteness* of contracts that provides

a rationale for government intervention in the creative industries on precisely the same grounds as the case for arts subsidy – the presence of external effects and public goods characteristics in creative work.

The economics of creativity needs to research the motivation of artists/creators, the role of training and human capital formation on both the supply of artists and on the demand for them (so far unstudied) and which types of policy measures encourage artists. Crucially, the point is not to go into what is or is not creative but to take an instrumental position on what economics can say about it (as with the arts – economists do not pronounce on art either). This is the same line taken by copyright law; it is instrumental (or purports to be) and it does not define art either – it confines itself to preventing unauthorised copying as the basis of the incentive to create.

Government policy for the creative economy is also instrumental and its policy instruments are limited: so far they have relied heavily on copyright law, on subsidy in the form of monetary grants and on subsidies to training large numbers of students in the arts, far more than will ever be able to obtain work in the arts. However, we do not know how well, if at all, these policies work. Governments are promising more than they can deliver in this area. Cultural economists should be in the forefront of research on these questions.

7. CONCLUSION

Along with many others working on copyright, including lawyers and other social and cultural scientists, I am profoundly sceptical about the direction copyright law has taken over the last few years. Unlike some others, however, I do not believe we should abandon copyright law for one reason alone: the proposed alternatives - government subsidies to artists vetted by Arts Councils and Academies, prizes and awards presided over by other artists and the arts establishment - as we know from cultural economics are no better and probably worse. There are other possibilities; for example, funds could be established to loan creators the capital to exploit their own work, loans which can be paid back out of royalty income. But just because we retain copyright as a principle does not mean the law should not be altered radically. I favour reducing the term to, say, 20 years and making it renewable thereby enabling the market to establish the value of the copyright. That could help to achieve real progress in the creative economy – the incentive to and reward of the true creators of creativity.

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