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IP AND CREATIVE INDUSTRIES POLICY IN THE UK

Kristofer Erickson[1]

Scholars of UK cultural policy attribute the introduction and rise of the creative industries policy discourse to the New Labour government elected in 1997.[2] It is likely that the embrace of creativity as a potential driver of economic growth in the UK was also shaped by existing global policy discourses such as urban cultural planning and the rise of the information economy.3 After 1997 in the UK, the newly-established Department of Culture, Media and Sport (DCMS) was instrumental in making the case for the existence of such a target for intervention, which could be improved to the benefit of national competitiveness and growth by adopting policies appropriate to needs of firms under this umbrella. The DCMS immediately set up the Creative Industries Task Force, which 'made recommendations for change in areas such as skills and training, finance for creative venture, intellectual property rights, and export promotion.'4 A Ministerial Creative Industries Strategy Group, including Ministers from the (then) Scottish Executive, Northern Ireland Executive and Welsh Assembly was formed to introduce and implement policy initiatives at the national and regional level.

The role of intellectual property

Intellectual property ("IP") law was identified early as a key policy instrument for the governance of creative industries activity. The 2001 DCMS Creative Industries Mapping Document defined it as 'those industries which have their origin in individual creativity,

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2 K Oakley, 'Not so cool Britannia: The role of the creative industries in economic development' (2004) 7(1) International journal of cultural studies 67; M Banks and D Hesmondhalgh, 'Looking for work in creative industries policy' (2009) 15(4) International journal of cultural policy 415; P Schlesinger, 'Creativity and the experts: New labour, think tanks, and the policy process' (2009) 14(1) The international journal of press/politics, 3.

3 Y Masuda, The information society as post-industrial society (World Future Society 1980); Castells M, 'European cities, the informational society, and the global economy' (1994) 204 New left review 263; R Florida, Cities and the creative class (Routledge 2005); Kovacs JF, 'Cultural planning in Ontario, Canada: arts policy or more?' (2011) 17(3) International Journal of Cultural Policy 321.

4 UK Department of Culture, Media and Sport, 'Creative Industries Mapping Document' (2001) Background 4.

skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property'.5 The DCMS identified the creative industries as comprising the 13 specific activities of advertising, antiques, architecture, crafts, design, fashion, film, leisure software, music, performing arts, publishing, software, and broadcasting (TV and radio).6 These categories have shifted somewhat over time. For example, the 2015 Creative Industries Economic Estimate report included a single category grouping together IT, software and computer services, and also included a category for museums and galleries.7

Definition of the core activities comprising the creative industries has proved problematic.8 One commonly raised critique of the creative industries concept in the UK is that significantly different activities are grouped together under one collective banner. These differences include particularities of medium and copyright subject matter, industry organisation and structure, informal norms and practices. More fundamentally, the nature of creative tasks and the type of creative labour that goes into each activity are widely different.9 Categorisations chosen to represent the creative industries have implications for IP policy, as they pertain to legal concepts such as the fixity of expression, the threshold of originality and the idea/expression dichotomy, which can differ across mediums and established norms of creative practice. These differences have led to political and scholarly disagreement over the appropriate policies to promote the creative industries in the UK. For example, should television formats be protectable with formal IP rights, while industry participants have established their own collective norms to govern trade?10 Would lengthening the term of copyright protection in music to benefit artists who recorded in the 1960s, benefit music industry creators today?

Another inconsistency in the concept of creative industries is the assumed importance of IP rights as an incentive and driver of growth. Early policy definitions of the creative industries activities strongly linked creative output to exclusive property rights, sometimes referring to similar collections of activities as 'copyright industries'. This is understandable in the case of the UK, which is a major exporter of cultural products, owing in part to the large international English-speaking market. In the late 1990s, incumbent

5 UK Department of Culture, Media and Sport, 'Creative Industries Mapping Document' (2001) 3.
6 UK Government Transparency Data: Creative Industries Mapping Documents (1998) < https://www.gov.uk/government/publications/creative-industries-mapping-documents-1998> accessed 30 May 2017.
7 UK Department of Culture, Media and Sport 'Creative Industries Economic Estimates – January 2015' (2015) 10.
8 Hesmondhalgh (n 2) 11.
9 Oakley (n 2) and Hesmondhalgh (n 2).
10 S Bechtold 'The Fashion of TV Show Formats' (2013) Mich. St. L. Rev. 451.

creative and media companies were struggling to adapt to digitalisation and the widespread use of computer networks to share and download copyright protected content, making intellectual property protection a key concern.11 Policy debates in the UK were dominated by calls to better protect creative goods through stronger IP protection. The DCMS 2001 mapping document encouraged 'ensuring wider public awareness of the importance of intellectual property rights to longer-term creativity'.12 Since then, IP has been consistently identified as a prerequisite for creative industries growth, even though economic evidence of the incentive role of copyright is lacking.13 One problem is that not only traditional 'creative' work, but nearly all commercial activities generate certain expressions protected by copyright. Furthermore, not all that passes for creative work involves or attracts copyright protection (for example, certain aspects of a television format). Research carried out with artistic and cultural producers has located a range of motivations, only some of which can be linked to exclusive IP rights.14 So, copyright protection may be a necessary but insufficient cause to elevate a given commercial or non-commercial activity to 'creative industry' status.

A copyright industry?

As far as copyright and other IP rights do play a part in regulating creative industry activity, we can identify particular linkages between these two concepts relevant to the UK policy landscape. First, as explored in detail earlier in this collection, creative industries rely primarily (although not exclusively) upon copyright as the legal mechanism to assert ownership in original expressions, a feature not shared by other sectors, which may make more use of patent, trade mark or design right when available, or other legal tools such as contract. An important distinction for creative industries is that copyright attracts automatically to a work once the expression is in fixed form. Unlike patent and trade mark, no registration formality is necessary; copyright resides automatically with the individual or firm that first created the work. In order to make use of an existing work protected by copyright, the user needs to obtain a licence from the copyright owner to adapt or reproduce it. Doing so incurs the cost of the licence itself as well as search costs involved in tracking down the appropriate owner(s), which can increase substantially the cost of using copyright material in certain contexts.15 The period of protection offered by copyright is

11 M Kretschmer, GM Klimis and R Wallis, 'Music in electronic markets: An empirical study' (2001) 3(4) New Media & Society, 417.
12 DCMS (n 4).
13 R Towse, 'Creativity, copyright and the creative industries paradigm' (2010) 63(3) Kyklos 461
14 Ibid.
15 S Baldia, 'The Transaction Cost Problem in International Intellectual Property Exchange and Innovation Markets' (2013) 34 Northwestern Journal of International Law & Business 1.

limited,16 but endures considerably longer than other time-limited IP rights. In Europe and the UK, copyright protection for literary, artistic and audiovisual works generally lasts for 70 years from the year of the author's death.17 In the case of works made for hire (for example, within a business) protection in the UK lasts for 70 years from first publication, the same term of protection granted to pseudonymous or anonymous works. At the time of copyright expiry, the work then falls into the public domain. Without a formal registration system, it can be challenging to ascertain when a work falls out of copyright protection and into the public domain, introducing search costs for would-be users. The concept of follow-on innovation was largely absent from early discussions of UK Creative Industries policy, however recent scholarship in law and economics explores the role of copyright in promoting or inhibiting follow-on creativity.18

A second differentiating feature of creative industry firms is that they deal largely in intangible goods and are therefore more susceptible to copying than those which offer tangible products. This issue is accelerated by networked digitalisation, which has introduced appropriability challenges for business models across a variety of sectors.19 A first wave of research on the effects of digitalisation on the creative industries dealt primarily with the impact of unauthorised copying (often termed piracy) on commercial products and firms' ability to invest in new creative production.20 Piracy remains a concern for UK creative producers, however new business models and new co-creative practices are challenging the previous emphasis on copyright's role as incentive in creative production. Research and policy attention has begun to focus on topics such as increasing audience participation in creative production, network effects arising from interactivity, cost savings in production due to digitalisation and effects of competition from new market entrants.21 The majority of previous research considered user and audience consumption of works in which a firm holds a copyright and can attempt to control downstream use. However, the

16 See also Pavis (2018), this volume.
17 Directive harmonizing the term of copyright protection, Directive 93/98/EC Council Directive 2006/116, Art 1 2006 OJ L 29 24 November 1993 9-13 .
18 CJ Buccafusco and CJ Sprigman, 'The creativity effect' (2011) 78 University of Chicago Law Review; K Erickson and others, Copyright and the Value of the Public Domain: An empirical assessment (UK: Intellectual Property Office 2015).
19 (Hesmondhalgh (n 2); D Teece, 'Business models, business strategy and innovation' (2010) 43(2) Long range planning 172.
20 (WM Landes and RA Posner, 'An economic analysis of copyright law' (1989) 18(2) The Journal of Legal Studies 325-363; SJ Liebowitz, 'Copying and indirect appropriability: Photocopying of journals' (1985) 93(5) Journal of Political Economy 945-957; R Watt, Copyright and Economic Theory (Edward Elgar 2000).
21 L Aguiar and J Waldfogel, Revenue, New Products and the Evolution of Music Quality Since Napster (JRC-Seville Joint Research Centre 2015); G Hearn, S Roodhouse and J Blakey, 'From value chain to value creating ecology: Implications for creative industries development policy' (2007) 13(4) International Journal of Cultural Policy 419

adoption of co-creative business models, particularly in digital media, suggests that creative industry policy needs to consider other forms of innovation beyond exploitation of exclusive rights including, but not limited to User Generated Content (UGC), parody, remix and transgressive reuse, as well as open innovation and distributed (crowdsourced) forms of creative production.

Composition and firm behaviour

The creative industries of the UK are predominantly comprised of small and medium sized firms (SMEs), presenting challenges for IP policy. The impact of firm size and industry structure on innovation has been an important object of study, for example by the UK Intellectual Property Office in a series of Intellectual Property Awareness surveys22 conducted in 2006, 2010 and 2015. These studies track the identification and exploitation of IP assets within firms, and managers' awareness of IP rights in their strategic decision making. A consistent finding across survey cohorts is that business managers are frequently unfamiliar with formalities of IP registration (for example the requirement not to reveal an innovation before applying for a patent, that firms struggle to valuate and raise financing from IP assets, and that out-licensing IP is not frequently pursued.23

Creative SMEs traditionally face strategic decisions regarding both upstream and downstream IP licensing. Commonly, this decision has been characterised as a choice between work-for-hire or in-licensing on the one hand, and original creative production on the other.24 In-licensing arrangements may be attractive to small firms because they represent a more stable and less temporally variable source of revenue and can establish a reputation from a portfolio of commissioned work. One common finding is that creative firms choose licensed work-for-hire projects in order to bring in revenue in the short and medium term, but that these tasks fail to satisfy creative incentives for workers and may inhibit long-term sustainability.25 Drawing on the concept of ambidexterity developed by March,26 Knight and Harvey27 characterise the management challenge for creative firms in

22 See Intellectual Property Office, 'Intellectual Property Awareness Survey: Engaged Businesses' (UK: Intellectual Property Office 2015).
23 Ibid. 6
24 S Hotho and K Champion, 'Small businesses in the new creative industries: innovation as a people management challenge' (2011) 49(1) Management Decision, 29
25 D Hesmondhalgh and S Baker, '"A very complicated version of freedom:" Conditions and experiences of creative labour in three cultural industries' (2010) 38(1) Poetics 4.
26 J March, Exploration and exploitation in organizational learning (1991) 1(2) Organization Science, 71.
27 E Knight and W Harvey, 'Managing exploration and exploitation paradoxes in creative organisations' (2015) 53(4) Management Decision, 809

particular as a tension between 'exploration' and 'exploitation' of innovative ideas. Many smaller firms therefore engage in a hybrid model of in-licensing and original creative work, using the former to sustain activities while aiming to produce an original hit that will permit growth and greater autonomy.

Creative industries policy in the UK has sought to increase the ability of small firms to capture value from IP investments by assisting them in identifying material suitable for IP protection and exploitation. For example, the Communications Act 2003 compelled broadcasters to adopt terms of trade which enabled independent programme producers to retain and exploit secondary rights in commissioned work. This reversed the previous status quo in which it was common for commissioning broadcasters to request all rights in a new production. However, it is unclear whether the policy change had the desired effect of improving appropriability of creative outputs for small firms, or whether other factors are determinant in the ability of independent producers to exploit IP rights.28 The report on Digital Opportunity led by Professor Ian Hargreaves in 2011 identified similar issues with the existing copyright framework in the UK, particularly focused on lowering licensing transaction costs, reducing the risks associated with copyright disputes and clarifying the scope of exceptions to copyright.29 As new business models and new forms of open and collective innovation are adopted by creative firms, it is necessary for researchers and policymakers to better understand the relationship between IP protection and firm sustainability in dynamically changing creative markets. Improving understanding of the various ways in which intellectual property rights both drive and inhibit new forms of digital innovation is a key task for empirical research.

Conclusion: a one-size-fits-all IP policy?

IP and in particular, copyright, has been central to the policy discourse since the establishment of the 'creative industries' as a target for government in the late 1990s. Copyright was initially linked to the success of UK industries in a one-way fashion, as an incentive for more production through stronger enforcement of private rights. In the media and in public consultations, illegal piracy continues to be raised as an important concern by cultural producers. Increasingly however, policy makers have considered balancing enforcement of rights with other concerns, such as the negative effects of transaction costs imposed by copyright and the potential benefits of encouraging follow-on innovation. Some

28 G Doyle and R Paterson, 'Public policy and independent television production in the UK' (2008) 5(3) Journal of Media Business Studies 17-33; Intellectual Property Office, 'From Ideas to Growth: Helping SMEs get value from their Intellectual Property' (UK: Intellectual Property Office 2012).
29 I Hargreaves, 'Digital Opportunity: a review of intellectual property and growth: an independent report' (2011)

creative firms have adopted business models which could benefit from a more balanced copyright policy. As a result, the UK creative industries policy landscape is now host to a diversity of voices (including users, co-creators, platforms, intermediaries and content producers) each with different perspectives on IP. If the notion of a monolithic IP policy for the creative industries was overly optimistic in the 1990s, the situation in 2017 is even more complex. With ongoing changes to consumption and production facilitated by global networked communication, as well as changes to the legal and economic relationship of the UK to Europe taking place in the near term, UK creative industries policy has some important decisions to make.