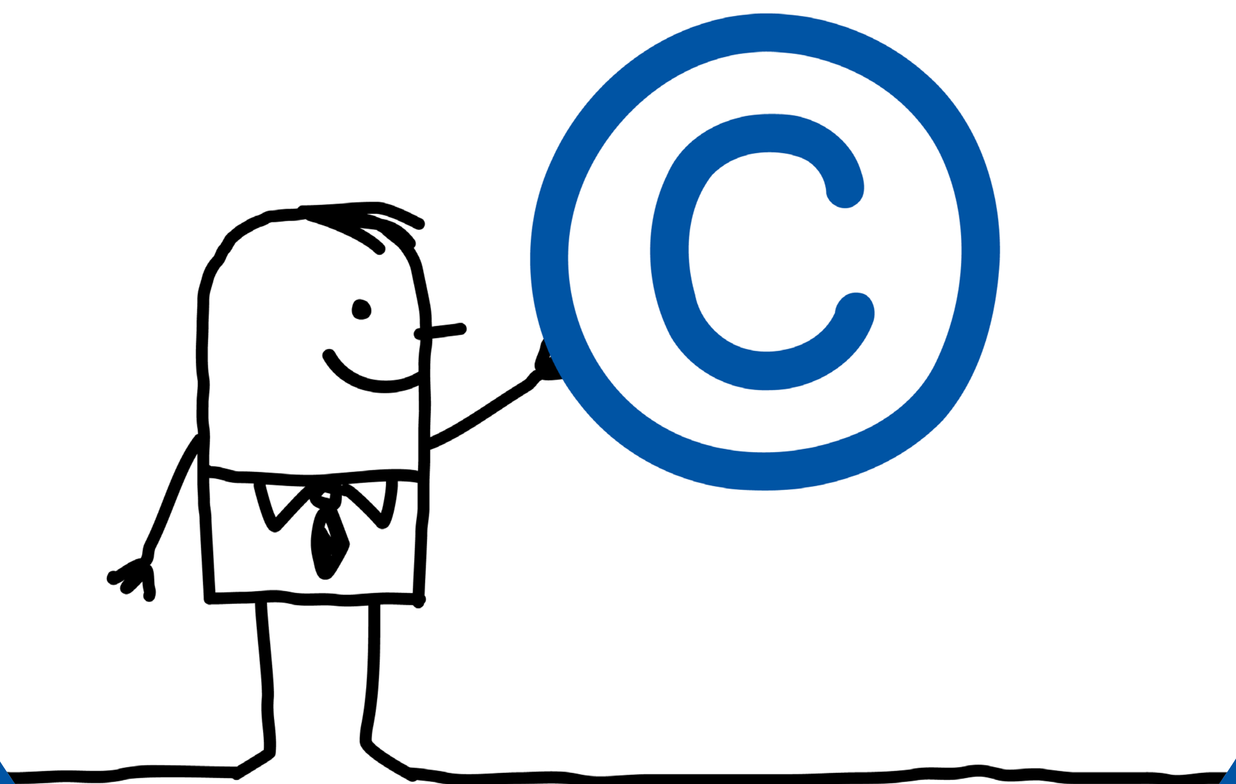
The Lost Philosophy of Copyright

2022 ELI Young Lawyers Award Winning Paper



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Executive Summary

Creative expressions are of great value to society. They inspire, lead to progress, and have an undeniable potential for bringing humanity together. For these reasons, it is essential to protect those who are able to accomplish such great things by simply expressing themselves, their values, and their ideas. Copyright is the single most important instrument to achieve this. For this reason, authors are to be protected and stimulated to produce. Furthermore, they should be able to earn a livelihood from their work. However, as science and technology have progressed, our copyright rules and principles needed to as well. Yet somewhere along the way, we have forgotten what is worthy of protection and the reason for it being so important. We are now in a situation where more emphasis is placed on the material interests produced by the distribution of works of art, rather than on the personalities of authors who have produced them. Even worse, when trying to re-establish the balance between the involved parties, authors, consumers and publishers, the interest of the audience for whom the works are created, of the societies it wishes to improve, were completely neglected. Considering the speed at which technology has and continues to evolve and the many different interests that require attention, such a loss of path can be forgiven but only if we acknowledge the error of our ways and change course. Or at least try to do so. A continuous persistence of the claim that (newly) implemented rules achieve balance neither helps us move forward, nor makes the rules fair. The European Union once again has the opportunity to lead the world into the future of copyright and one can only hope that it will seize the occasion and strive relentlessly towards finding a balance, wherever it may be and whatever it may mean.

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1. INTRODUCTION

The English term 'copyright', coined following the rise of the printing press and describing the right to make copies of a work,[1] can lead to erroneous conclusions as to its scope and content, in particular when one delves into the copyright history of the continental legal system, where the right to copy a book used to be peripheral.[2] Even the ancient Romans gave preference to the recognition of authorship and the integrity of the work, while reproduction and redistribution were free for anyone in possession of a copy of a work.[3] In the case of Ancient Rome, these were not legal, but moral rules, governed by societal norms and culture.[4] Nonetheless, they provide us with valuable insight. The ancient authors were more concerned with fame and honour as their ultimate rewards.[5]Although certain ancient writers did indeed complain of the fact that publishers were making more money from their works than they were,[6] the point remains the following. Despite its long tradition of emphasising the protection of an author's personality and relation to his/her work as his/her most prized possession and contrasting that with the public interest, Europe has drifted far away from its copyright roots and closer to the money-driven Anglo-Saxon system.[7]

In this paper, it will be argued that, although the environment in which artistic works circulate has shifted into the online world, the associated shift in our philosophy was not necessary and did not take place for the better. New rules and principles could have been drafted with the same ancient ideas in mind, as opposed to taking a short cut, so to speak, and applying the rules constructed in the UK and USA. Nonetheless, legal systems are not carved in stone and there is much that the European Union could do to address some of the existing problems and connect us with our philosophical roots.

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[1] JC Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 Tulane Law Review no 5, 997 <https://scholarship.law.columbia.edu/faculty_scholarship/620> accessed 12 April 2022.

[2] M Canellopoulou-Bottis, 'Utilitarianism v. Deontology: A Philosophy for Copyright' (2018) 5 <https://ssrn.com/abstract=3298655> accessed 12 April 2022.

[3] K de la Durantaye, 'Origins of the Protection of Literary Authorship in Ancient Rome' (2007) Boston University International Law Journal, 2007, Columbia Public Law Research Paper no 07-139 37 <https://ssrn.com/abstract=966192> accessed 14 February 2022.

[4] Ibid.

[5] Ibid 77–83.

[6] Ibid 81.

[7] See, for example, Canellopoulou-Bottis (n 2) 11–21.

2. THE LOBBY AND PROFIT DRIVEN LEGISLATIVE PROCESS

Ever since the Berne Convention for the Protection of Literary and Artistic Works[8] was shaped by European scholars and artists, Europe has been the continent leading by example when it comes to the protection of authors and their works.[9] However, the climate in Europe has changed and today copyright issues in the European Union are governed by a variety of legal instruments,[10] primarily shaped by strong lobbies,[11] and standing on slippery legal grounds.[12] The legal rationale for all relevant regulation is art 114 (ex 95) of the Treaty on the Functioning of the European Union (TFEU), regulating the establishment of the internal market and emphasising the need for its unfragmented, continued functioning.[13] A necessary conclusion then is that artistic works are goods and that their free exchange is necessary for a fully functioning single market.[14] This conclusion, further strengthened by various directives stating that works of art are 'property',[15] has led us away from the Roman legal concept of property, which extends only to material things – *res corporales*.[16] It has also led us astray from the *droit d'auteur* philosophy, which was more concerned with protecting authors than the profits of their labour.[17] Instead, we have steadily approximated the Anglo-Saxon, utilitarian, and primarily capitalistic view of copyright, in which it is necessary to provide (intellectual) property protection because of its incentivising function and role in encouraging further creations.[18] This might be true to a certain extent. One must not underestimate the incentivising function of copyright that allowed the flourishing of art in the past decades by allocating the risks between right holders and the public.[19] Nonetheless, one must not overestimate it either. Some of the greatest works of art were created long before anybody guaranteed artists protection.

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[8] Berne Convention for the Protection of Literary and Artistic Works, 1886.

[9] JC Ginsburg, 'From Hypatia to Victor Hugo to Larry and Sergey: "All the world's knowledge" and universal authors' rights' (2013) Journal of the British Academy 1 81 <https://www.thebritishacademy.ac.uk/documents/1549/JBA-001-071-Ginsburg.pdf> accessed 12 April 2022.

[10] A set of 11 directives, 2 regulations, and 3 additional instruments currently form the copyright framework. For more, see European Commission, 'Shaping Europe's Digital Future. The EU Copyright Legislation' <https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation> accessed 11 April 2022.

[11] See, for example, B Hugenholtz, 'Why the Copyright Directive is Unimportant, and Possibly Invalid', (2000), European Intellectual Property Review (EIPR) 11 501 <https://www.ivir.nl/publicaties/download/opinion-EIPR.pdf> accessed 2 February 2022; JP Quintais, 'The New Copyright in the Digital Single Market Directive: A Critical Look', (2020), EIPR 2020(1) (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424770> accessed 2 February 2022.

[12] Hugenholtz (n 11).

[13] See, for example, Recital 2, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92.

[14] A Renda, F Simonelli, G Mazziotti, A Bolognini, and G Luchetta, 'The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society', (2015) CEPS Special Report no 120 6 <https://www.ceps.eu/wp-content/uploads/2015/11/SR120_0.pdf> accessed 2 February 2022.

[15] See, for example, Recital 9, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

[16] De la Durantaye (n 3) 55.

[17] Canellopoulou-Bottis (n 2) 23.

[18] Ibid 24–29.

[19] F Benhamou and S Peltier, 'Copyright, Incentive to Creativity or Deterrent to Distribution? An Empirical Analysis of a Creative Work for Television' (2011) Revue d'économie industrielle vol 135, 3, 11, <https://www.cairn-int.info/article-E_REI_135_0047--copyright-incentive-to-creativity-or-det.htm> accessed 12 April 2022.

What is more, while some artists in Ancient Rome and the Middle Ages were paid for their works or performances, others did not even claim authorship, believing that the works were actually works of God.[20]

On the other hand, even if copyright harmonisation is necessary for the smooth functioning of the internal market and works had to be characterised as 'goods' to allow this harmonisation, the same cannot be said for large lobbies shaping its content. To make a case against lobbying, we need only look at the USA's Digital Millennium Copyright Act. This Act, which supposedly served as inspiration for the European Information Society Directive ('InfoSoc Directive'),[21] has, after years of negotiations, grown exponentially in size,[22] while at the same time becoming increasingly internally inconsistent.[23] Furthermore, Europe has proven to be unimmune to this plague. First the InfoSoc Directive was accused of being the most lobbied directive of all time,[24] only to be replaced by its successor, the Directive on Copyright in the Digital Single Market ('Copyright Directive').[25] Although lobbying has been a part of designing copyright regulations ever since the wars between stationers and printers, when designing the Statute of Anne in 1710,[26] the fact remains that with each passing legislation, heavily influenced by vicious lobbying wars, the regulations became more flawed, less effective,[27] and drifted further away from the underlying philosophies and ideals.

The directives have effectively provided benefits and protection to publishers, with the result that nobody could access or copy the works they are entitled to distribute. However, in a world where making copies is possible at zero marginal cost,[28] this standard seems unreasonable. On the other hand, the rights of authors, wishing to be recognised, and of the public, wanting to enjoy and share the content of their favourite authors, are ignored. The latest copyright regulation attempted to 'fix' this existing imbalance by means of the algorithmic detection of potentially infringing content and its automated blocking.[29] However, such a system hinders the public from enjoying its side of the copyright bargain, guaranteeing easy access to works and their use for private purposes. Explaining and enumerating all the problematic provisions of the relevant legal instruments, as well as examining the factors that influenced it, is beyond the scope of this paper. The focus will rather be on the ideal we have drifted away from and how we could realise it in the modern world.

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[20] M Lidova, 'Manifestations of Authorship, Artists Signatures in Byzantium', (2017), Venezia Arti, vol 26, 102, <http://edizionicafoscari.unive.it/media/pdf/article/venezia-arti/2017/26/art-10.14277- 2385-2720-VA-26-17-6_uWnadlM.pdf> accessed 12 April 2022.

[21] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001. See, for example, SE Blythe, 'The U.S. Digital Millennium Copyright Act and the E.U. Copyright Directive: Comparative Impact on Fair Use Rights', (2006), Tulane Journal of Technology & Intellectual Property, vol 8 <https://journals.tulane.edu/TIP/article/view/2494> accessed 2 February 2022; DP Homiller, 'The Digital Millennium Copyright Act and the European Union Copyright Directive: Next Steps' <https://web.law.duke.edu/cspd/papers/nextsteps.doc> accessed 2 February 2022.

[22] J Litman, *Digital Copyright* (Prometheus Books, New York, 2001) 142.

[23] Ibid 141–149.

[24] Hugenholtz (n 11).

[25] Quintais (n 11) 1.

[26] Canellopoulou-Bottis (n 2) 25.

[27] Quintais (n 11) 22.

[28] R Giblin, 'A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid' (2017) The Columbia Journal of Law & The Arts, vol 41 no 3, 371 <https://journals.library.columbia.edu/index.php/lawandarts/article/view/2019> accessed 26 March 2022.

[29] Primarily by implementing art 17 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92.

3. RETURNING EUROPE TO ITS COPYRIGHT FOUNDATIONS

Several paths could be taken in order to address the existing imbalances. First one would be to protect the moral rights to paternity and integrity as fundamental human rights. With the scope of fundamental rights constantly broadening to include, for example, the right to data protection, there is no obvious reason why authors' rights could not also be incorporated into the existing set of rules. Furthermore, such rights are already recognised by certain international documents, such as the Universal Declaration of Human Rights (art 27) and the International Covenant on Economic, Social and Cultural Rights (art 15). Although these are relatively weak arguments, since the mentioned articles were primarily adopted due to their role in protecting other, 'more important' rights (such as freedom of expression)[30] and are mentioned only as necessary facilitators of the rights to cultural freedom, participation, and the overall interest of societal progress,[31] this should not undermine their value. A further reason in favour of the above suggestion is that even average, non-professional users, who are also authors on the Internet, seem to care about attribution of works in which they invested substantial time and energy.[32] Moreover, this right becomes particularly important in light of the fact that publishing and wide circulation are easy to achieve while visibility is not, and, in order to achieve visibility, attribution is crucial.[33] To conclude, these rights are becoming increasingly relevant and the EU proclaiming them as fundamental human rights would not be as unprecedented as it may seem at first glance. Furthermore, the EU would have the necessary 'wiggle room' to develop its own limitations and interpretations in accordance with its existing legal principles. And, by doing so, it would address one of the mayor copyright problems in the age of the Internet.

On the other hand, freedom of expression guarantees a wide range of protected uses to users, for which the latest Copyright Directive does not provide effective safeguards. First of all, the notorious art 17 of the 2019 Copyright Directive relies greatly on the capability of algorithms to automatically recognise protected uses. Since parody, critique, and pastiche are among these protected uses, it does not seem likely that algorithms will correctly interpret and recognise them. Moreover, a great deal of pressure is put on service providers to develop such algorithms in an attempt to avoid hefty fines for the availability of infringing content. However, the only way to control possible algorithmic errors is to review reports on user complaints about unlawfully censored content. This mechanism can only be effective if the users know what their rights are, are confident that their use is protected, and consider their post sufficiently important to challenge the large company over it. Such a scenario seems highly unlikely, with most users simply carrying on with their day and forgetting about the unpublished post, especially if their involvement in social media is not professional in nature. Furthermore, considering the vast amounts of

[30] LR Helfer and GW Austin, 'Chapter 3: Creators' Rights as Human Rights and the Human Right of Property' in LR Helfer and GW Austin (eds), *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press 2011) 179.
[31] Ibid 179–180.
[32] J Meese and J Hagedorn, 'Mundane Content on Social Media: Creation, Circulation, and the Copyright Problem', (2019) Social Media + Society April-June 2019, 6 <https://journals.sagepub.com/doi/pdf/10.1177/2056305119839190> accessed 12 April 2022.
[33] Ibid 8.

content produced every minute, it would be almost impossible to review all posts or complaints, even if attempts were made to do so. Nonetheless, no legal amendments should be made based on presumptions and, before taking any action, independent research should be conducted to ascertain how many users report unjustified, excessive censoring or are even aware that it was unlawful. Furthermore, automated decisions should be explicitly prohibited until we are certain of their real effects because, until changes are made, it seems much easier and more reasonable for tech giants to block all potentially infringing content and deal with a few complaints which are made when their algorithms 'guess wrong'.

4. CONCLUSION

The protection of authors is important, not merely because we need to incentivise them, but also because of their personal investment in their works and their role in facilitating human progress. This is not disputed anywhere or by anyone. However, the spotlight has shifted from protecting authors to protecting material interests in the production and distribution of their works, often at the expense of the public interest. Publishing and distribution are not as expensive and risky as they once were, and rather than using this as an excuse for stricter rules, this calls for a change of perspective. Our primary concern should be to protect the honour, reputation, and the personality of authors. Once this protection is granted, we need to (re-)establish a balance with the public interest. People were always free to use their copies of works as they pleased, as long as the author's reputation was not affected and they were not used for commercial purposes – these principles cannot and should not change in the age of the Internet.

To conclude, we have the possibility to take the lead on modernising copyright regulation. State-of-the-art technology can allow us to find middle grounds but not in the manner envisaged and proclaimed in the 2019 Directive. Europe needs to find inspiration in its own roots, to rearrange its priorities, and to think of answers to new copyright issues. Emphasising the protection of human rights of people on both sides of the copyright bargain, while constructing flexible rules and exceptions that resist the challenges of time, should be our primary concern.

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