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INTRODUCTION TO COPYRIGHT

1 INTRODUCTION

In British legal parlance, 'copyright' is the term used to describe the area of intellectual property law that regulates the creation and use made of a range of cultural goods such as books, songs, films, and computer programs.[1] British law describes the various objects that are protected by copyright law as 'works'. The intangible property protected by copyright law is distinctive in that it arises automatically and usually for the benefit of the author.[2] Various rights are conferred on the owner of copyright, including the right to copy the work and the right to communicate the work to the public.[3] The rights vested in the owner are limited, notably in that they are not infringed when another person copies or communicates to the public a work that they have created themselves. The rights given to a copyright owner last for a considerable time: in many cases, for 70 years after the death of the author of the work.[4] The basic framework of British copyright law is largely to be found in the Copyright, Designs and Patents Act 1988 (CDPA 1988),[5] although this has now been amended significantly.

This chapter provides an outline of certain background matters that will make the next chapters easier to follow. We begin by looking at some of the concepts that we will encounter in the coming chapters. We then turn to look at the history and functions of copyright law, as well as international and European influences on British copyright law.

2 'COPYRIGHT' AND *DROIT D'AUTEUR*

Many factors shape the way in which we view British copyright law. To some, it may appear to be an unnecessary restriction on their ability to express themselves; for others,

[1] For an analysis of various other perspectives on copyright, see P. Goldstein, 'Copyright' (1990–91) 38 *J Copyright Soc'y USA* 109.

[2] See Chapter 5. [3] See Chapter 6. [4] See Chapter 7.

[5] Certain related rights, such as the 'publication right' and the 'database right', are found in statutory instruments. On these rights, see Chapter 13.

copyright law provides the means to protect significant investment and labour. More generally, the image that we have of British copyright law is shaped by the way in which we think it relates to other legal regimes. Most famously, UK copyright (and that of many other 'common law' countries) is said to be distinct from and in many ways in opposition to the civil law *droit d'auteur* system (such as that of France). While there is now a growing body of literature that questions the accuracy of these portrayals,[6] nonetheless these caricatures have had and undoubtedly will continue to have an impact on the way in which the law develops.

The common law copyright model is said to be primarily concerned with encouraging the production of new works.[7] This is reflected in copyright law's emphasis on economic rights, such as the right to produce copies. Another factor that is held to typify the copyright model is its relative indifference to authors. This is said to be reflected in the fact that British law presumes that an employer is the first owner of works made by an employee,[8] the paucity of legal restrictions on alienability,[9] and the limited and half-hearted recognition of so-called 'moral rights'.[10] In contrast, the civil law *droit d'auteur* model is said to be more concerned with the natural rights of authors in their creations. This is reflected in the fact that the civil law model not only aims to secure the author's economic interests, but also aims to protect works against uses that are prejudicial to an author's spiritual interests (in particular through moral rights).

3 AUTHOR'S RIGHTS AND NEIGHBOURING RIGHTS

While British copyright law abandoned the formal distinction between different categories of work with the passage of the 1988 Act, nonetheless an informal distinction is still drawn between two general categories of subject matter: 'authorial works' and 'entrepreneurial works'.[11] This reflects the distinction drawn in many legal systems between 'author's rights' and 'neighbouring rights'. 'Author's rights' refer to works created by 'authors', such as books, plays, music, art, and films. In contrast, 'neighbouring rights' (which are sometimes called 'related rights' or *droits voisins*) refer to 'works' created by 'entrepreneurs', such as sound recordings, broadcasts, and the typographical format of published editions. The rationale for differentiating between these two categories of subject matter lies in the facts that neighbouring (or entrepreneurial) rights are typically derivative, in the sense that they use or develop existing authorial works, that they are a product of technical and organizational skill rather than authorial skill, and that the rights are initially given not to the human creator, but to the body or person that was financially and organizationally responsible for the production of the material.[12]

[6] G. Davies, *Copyright and the Public Interest* (1994; 2nd edn, 2002); J. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', in Sherman and Strowel; A. Strowel, '*Droit d'auteur* and Copyright: Between History and Nature', in Sherman and Strowel.

[7] For a typical statement, see T. Cook (ed.), *Sterling on World Copyright Law* (4th edn, 2015), [16.09].

[8] See Chapter 5, section 3, pp. xxx–x. [9] See Chapter 12, section 2, p. xxx. [10] See Chapter 10.

[11] In fact, as we will see, the process of European harmonization has reinforced the relevance of the distinction: see, e.g., section 2.3.2*ff*, pp. xx, xx–yy.

[12] For a general discussion, see W. Grosheide, 'Paradigms in Copyright Law', in Sherman and Strowel, 223.

4 HISTORY

The history of copyright is a complex, subtle, and rich subject. Depending on one's interest, it is possible to highlight many different themes and trends. For example, a history of copyright could look at the gradual expansion of the subject matter and the rights granted to owners, the role that copyright law plays in shaping the notion of authorship, or the impact that copyright has on particular cultural practices. Most histories of British copyright law tend to focus on the origins of copyright, which are usually traced back to the 1710 Statute of Anne, or occasionally to the practices developed in the sixteenth century to regulate the book trade.[13] In this section, we limit ourselves to a brief chronological account of some of the more important political and legal events that frame and shape the current law.

While aspects of copyright law have a long history, copyright law did not take on its modern meaning as a discrete area of law that grants rights in works of literature and art until at least the mid-nineteenth century.[14] Moreover, it was not until the passage of the Copyright Act 1911 that copyright law in Great Britain was rationalized and codified into the type of modern, abstract, and forward-looking statute that concerns us here.[15] The 1911 Act was also important insofar as it abolished the rights in unpublished works (often called 'copyright') that had been recognized at common law (and also repealed the plethora of subject-specific statutes that existed at the time). In their place, the 1911 Act established a single code that conferred copyright protection on a number of works (whether published or not, and including many previously unprotectable works, such as works of architecture, sound recordings, and films). In most cases, protection lasted for 50 years after the death of the author of the work. At the same time, the 1911 Act abandoned all requirements concerning formalities (in particular the need for registration with the Stationers' Company). Infringement was also expanded to include translations and adaptation, as well as reproductions 'in a material form'.[16]

Following a review in 1952, the 1911 Act was replaced by the Copyright Act 1956.[17] This extended the scope of copyright to encompass sound and television broadcasts, as well as

[13] Primary sources and commentaries are available online at http://www.copyrighthistory.org. For secondary accounts, see B. Kaplan, *An Unhurried View of Copyright* (1967), 1–25; L.-R. Patterson, *Copyright in Historical Perspective* (1968); D. Saunders, *Authorship and Copyright* (1992); M. Rose, *Authors and Owners* (1993); C. Seville, *Literary Copyright Reform in Early Victorian England* (1999); R. Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Britain throughout the Eighteenth Century (1695–1775)* (2004); C. Seville, *Internationalisation of Copyright: Books, Buccaneers and the Black Flag* (2006); R. Deazley, *Rethinking Copyright: History, Theory, Language* (2006); R. Deazley, L. Bently, and M. Kretschmer (eds), *Privilege and Property: Essays on the History of Copyright Law* (2010); I. J. Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (2010); R. Spoo, *Without Copyrights: Piracy, Publishing and the Public Domain* (2013); M. Rose, *Authors in Court* (2016); O. Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790–1909* (2016); E. Cooper and R. Deazley, 'Interrogating Copyright History' (2016) 38(8) *EIPR* 467; I. Alexander and T. Gómez-Arostegui, *Research Handbook on the History of Copyright Law* (2016); E. Cooper, *Art and Modern Copyright: The Contested Image* (2018). For a historiography, see K. Bowrey, 'Who's Painting Copyright's History?', in D. McClean and K. Schubert, *Dear Images: Art, Culture and Copyright* (2002), 257.

[14] See Sherman and Bently, 111–28; B. Sherman, 'Remembering and Forgetting: The Birth of Modern Copyright Law' (1995) 10 *IPJ* 1.

[15] For historical accounts, see C. Seville, *The Internationalisation of Copyright* (2006), 139–45; R. Burrell, 'Copyright Reform in the Early Twentieth Century: The View from Australia' (2006) 27 *J Legal Hist* 239.

[16] CA 1911, s. 1(2).

[17] *Report of the Copyright Committee* (Cmnd. 8662, 1951–2) (Gregory Committee).

typographical formats of published editions.[18] The 1956 Act was amended on a number of occasions, primarily to take account of new technologies such as cable television and computer software.[19] A further periodic review in 1977 proposed a general revision of the 1956 Act.[20] After further negotiations and refinement, these proposals led to the passage of the Copyright, Designs and Patents Act 1988.[21]

The 1988 Act expanded significantly the rights given to copyright owners (notably by introducing a distribution right and a rental right). [22] At the same time, the Copyright Tribunal was established to ensure that copyright owners did not exercise their rights in an anti-competitive manner.[23] The 1988 Act also introduced a new category of rights, called 'moral rights', conferred on authors as such and not assignable.[24] Performers' rights, which were formerly dealt with under special Acts, were also included within the 1988 Act (where they are protected separately under Part II).[25]

Although the 1988 Act forms the basis of contemporary copyright law, it has been amended on a number of occasions since it came into force in August 1989. In most cases, these amendments were made to give effect to obligations imposed by EU directives. As we will see, while the European Union has stopped short of a wholesale approximation of copyright law, a series of specific interventions has altered the contents of the 1988 Act to such an extent that a recodification of national law would be desirable.

More significantly, however, the Court of Justice has set out to fill the gaps in the partial harmonization effected by legislation. In a remarkable series of decisions beginning with *Infopaq*,[26] the Court has ruled on the concept of originality,[27] the notion of the work,[28] authorship,[29] and the public,[30] as well as the copyright/design law interface—all matters that it had been thought remained unharmonized.[31] Moreover, the Court has started to interpret harmonizing legislation that appeared to afford member states flexibility as to its implementation, in ways that increasingly deprive member states of that freedom. In short, the Court has been reworking and developing the so-called *acquis communitaire*, with a view to harmonizing as much as it reasonably can.[32]

Alongside the shift over the last two decades in the sources of British copyright law, the law has inevitably had to respond to the challenges and opportunities raised by digitization, and particularly the Internet. Some of the responses occurred at EU level (such as

[18] CA 1956, ss 12–16.

[19] Cable and Broadcasting Act 1984 (adding cable programmes to protected subject matter); Copyright (Computer Software) Act 1985 (establishing copyright protection for computer programs). The Design Copyright Act 1968 sought to remedy certain problems in relation to copyright protection for designs.

[20] *Report of the Committee on Copyright and Designs Law* (Cmnd. 6732, 1977) (the 'Whitford Committee').

[21] See Green Paper, *Reform of the Law relating to Copyright, Designs and Performers' Protection* (Cmnd. 8302, 1981); Green Paper, *Intellectual Property Rights and Innovation* (Cmnd. 9117, 1983); White Paper, *Intellectual Property and Innovation* (Cmnd. 9712, 1986).

[22] See Chapter 6, section 6.3, pp. xxx–xx. [23] See Chapter 12, section 7.3.4, pp. xxx–yy.

[24] See Chapter 10. [25] See Chapter 13, section 2, p. xxx–x.

[26] *Infopaq Int v. Danske Dagblades Forening*, Case C-5/08 [2009] *ECR* I–6569 (ECJ, Fourth Chamber), [37]. See Chapter 4, section 3.4, xxx-y; M. van Eechoud, 'Along the Road to Uniformity: Diverse Readings of the Court of Justice Judgments on Copyright Work' (2012) 1 *JIPITEC* 60.

[27] See Chapter 4, Section 3.4, pp. xxx–y.

[28] *Bezpečnostní softwarová asociace*, Case C-393/09 [2010] *ECR* I–13,972 (ECJ, Third Chamber), [45]–[46] (graphic user interface treated as a work). See further Chapter 3, Section 1, pp. xxx-yy.

[29] *Martin Luksan v. Petrus van der Let*, Case C-277/10, EU:C:2012:65 (ECJ). See Chapter 5, section 4, p. xxx.

[30] *Socieded General de Autores y Editores de Espana (SGAE) v. Rafael Hotels SL*, Case C-306/05 [2006] *ECR* I–11,519. See Chapter 6, section 6.5, p. xxx-xxx.

[31] *Commission Staff Working Paper on the Review of the EC Legal Framework in the field of copyright*, SEC(2004)995, 14–15 ('originality' and 'the public' are unharmonized concepts).

[32] See also J. Griffiths, 'Constitutionalising or Harmonising?' (2013) 38 *ELR* 65.

the introduction of the making available right), and some fundamental issues—such as whether browsing and hyperlinking are permissible—have only recently been considered by the Court of Justice.[33]

Following a review of intellectual property and growth conducted by Professor Ian Hargreaves,[34] provisions on orphan works,[35] alongside significant reform of the exceptions to copyright, were effected in 2014.[36]

5 JUSTIFICATIONS

The existence of copyright in a particular work restricts the uses that can be made of the work. For example, a person who buys a protected CD cannot legally rip the recordings from that CD for a friend to use on that friend's mp3 player. As well as being inconvenient and/or expensive, copyright has the potential to inhibit the public's ability to communicate, to develop ideas, and to produce new works. For example, it seems that a blogger who creates a link to material on the Internet that happens to be there without the authority of the rightholder needs permission to do so, at least if the blog is commercial. Given that in the digital environment, just about any interaction with expressive material involves copying, it is understandable that the Danish art group, Superflex, has parodied Descartes famous aphorism, 'I think, therefore I am', with an alternative 'I copy, therefore I am' (which we reproduce on the cover of this textbook).

Because copyright law prohibits the unauthorized use of 'copies', it has the potential to inhibit the way in which people interact with and use cultural objects. It is therefore important that we constantly reassess its legitimacy. More specifically, we need to ask whether (and why) copyright is desirable. In this context, it is important to note that not everyone thinks that copyright is a good thing.[37] In fact, with the advent of the Internet, there are many who think that copyright unjustifiably stifles our ability to make the most of the new environment or that it impinges upon the public domain.[38] Others consider that while some aspects of copyright are justifiable, others are not. Typically, the argument is that copyright law has gone too far.[39] In response to these copyright sceptics or critics, six basic arguments are used to support the recognition (and further extension) of copyright: (i) natural rights arguments; (ii) reward arguments; (iii) arguments based on speech right; (iv) incentive arguments; (v) neoliberal economics; and (vi) arguments from democracy.[40]

[33] See Chapter 6, xxx, section 6.2, pp. xxx–x, section 6.5.3, pp. xxx–xx, and Chapter 9, section 3, xxx–x.

[34] Prof. I. Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) (the 'Hargreaves Review'), available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf.

[35] See Chapter 12, section 5, pp. xxx–yy.

[36] See Chapter 9, section 1, pp. xxx–yyy.

[37] Criticism of copyright has come from the likes of the 'Pirate Party', which has famously won seats in the European Parliament, as well as the Czech and Icelandic national parliaments, as well as giving rise to a religion, 'the missionary church of kopimism'. Initiatives to expand the role of copyright in the Internet context has produced a wave of popular antipathy towards it. For a review, see M. A. Carrier, 'SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements' (2013) 11 *Nw J Tech & Intell Prop* 21.

[38] For a general discussion of the public domain, see (2003) 66 *L & CP* (Special edition on the public domain); B. Hugenholtz and L. Guibault (eds), *The Future of the Public Domain: Identifying the Commons in Information Law* (2006).

[39] S. Trosow, 'The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital', (2003) 16 *Can J L Juris* 217.

[40] For an overview, see M. Spence, 'Justifying Copyright', in D. McClean and K. Schubert (eds), *Dear Images: Art, Culture and Copyright* (2002), 388.

5.1 NATURAL RIGHTS

According to natural rights theorists, the reason why copyright protection is granted is not that we think that the public will benefit from copyright; rather, copyright protection is granted because it is right and proper to do so. More specifically, it is right to recognize a property right in intellectual productions *because* such productions emanate from the mind of an individual author. For example, a poem is seen as the product of a poet's mind, of their intellectual effort and inspiration. As such, it should be seen as their property, and copying as equivalent to theft. Copyright is the positive law's realization of this self-evident, ethical precept. However, at this point, natural rights theorists divide as to exactly what it is about origination that entitles an author to protection. Some, particularly those associated with the continental European traditions, explain that works should be protected because (and insofar as) they are the expressions of each particular author's personality.[41] On the assumption that a work created by an individual reflects the unique nature of them as an individual, the natural rights arguments require that we allow the creator to protect the work (from misattribution, modification, or unauthorized exploitation) because it is an extension of the persona of its creator. A second version of natural right theory, strongly represented in the US literature, has tended to found itself on labour. Drawing on Locke's idea that a person has a natural right over the products of their labour, it is argued that an author has a natural right over the productions of their intellectual labour.[42]

Critics of natural rights theories of copyright take a number of different positions. Some simply reject the idea of 'natural rights'; others criticize the assumptions within the theory, for example that a natural right in labour justifies a natural right in the product of mixing labour and unowned resources. Some criticize the extension of natural rights theories to copyright, challenging the idea of individual creation of ideas, emphasizing the social (or 'intertextual') nature of writing and painting.[43] If works are seen less as the products of individual labour or personality and more as reworkings of previous ideas and texts, the claim to ownership seems weaker. Another critique questions why it is that a natural right in the products of one's labour should justify recognition of anything more than a right over the manuscript or immediate creation. A final argument criticizes natural rights theory on the ground that it provides no normative guidance as to the specific form of copyright law.[44]

5.2 REWARD

According to reward arguments, copyright protection is granted because we think it is fair to reward an author for the effort expended in creating a work and giving it to the public. Copyright is a legal expression of gratitude to an author for doing more than

[41] For personality theory based on Hegel, see J. Hughes, The Philosophy of Intellectual Property' (1988) 77 *Georgetown LJ* 287.

[42] On Locke and labour, see Hughes, ibid.; A. Yen, 'Restoring the Natural Law: Copyright as Labour and Possession' (1990) 51 *Ohio St LJ* 517; W. Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102 *Yale LJ* 1533. Note, too, H. Breakey, *Intellectual Liberty: Natural Rights and Intellectual Liberty* (2012) (highlighting the natural rights constraints on intellectual property rights).

[43] S. Shiffrin, 'Lockean Arguments for Private Intellectual Property', in S. Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (2001); P. Drahos, *The Philosophy of Intellectual Property* (1996), ch. 3; L. Zemer, *The Idea of Authorship in Copyright* (2006).

[44] J. O. Garon, 'Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics' (2003) 88 *Cornell L Rev* 1278, 1299–306.

society expects or feels that they are obliged to do. In a sense, the grant of copyright is similar to the repayment of a debt. (Although the language of reward often appears when discussing the 'incentive' theory of copyright, it differs from incentive theory: in reward theory proper, the reward is an end in itself; in incentive theory, the reward is a means to an end.)

Critiques of reward theory tend to pose two questions. First, they ask: do the circumstances in which copyright protection is granted correspond to the circumstances in which people deserve rewards? One answer is that a reward is deserved only where someone has done something that they felt was unpleasant and which they would not otherwise have done. If this is the case, copyright does seem to give far too many rewards. As we will see, copyright's threshold is set at a very low level and thus catches works that are created for their own sake, such as letters, holiday photographs, and amateur paintings. Another account sees the reward as being deserved where the person invested labour (irrespective of their ulterior motives or the pleasure or pain of labouring).

The second criticism questions the nature of the reward: why should a person be granted an exclusive right? There are other systems of reward (such as the MAN Booker Prize) that have fewer social and economic costs. The usual answer is that copyright allows the general public to determine who should be rewarded and the size of that reward: the more copies of a book that are purchased or the more times a record is played on the radio, the greater the financial reward that accrues to the copyright owner. Consequently, a property right is often the best way in which to ensure that the reward is proportional to the public's appreciation of the work.

5.3 ARGUMENTS BASED ON SPEECH

There is a growing group of scholars who emphasize the relationship between copyright and communication, figuring copyright either as a vehicle to protect the 'expressive autonomy' of authors or as an unwarranted constraint upon such autonomy.[45] Drawing on philosophical foundations that can be traced to the German philosopher, Immanuel Kant, it has been eloquently argued that copyright law serves as the legal mechanism to ensure that only persons authorized by the author 'speak' in the name of the author.[46] If unauthorized persons publish or communicate works without authorization, in effect, they compel the author to speak, thereby harming the author's autonomy. This wrong seems all the worse if such publishers alter the work.

If this theory seems to confer strong rights on authors, it is important to note the inherent limits: one author's rights should give way where another author needs to copy parts of an earlier work to express themselves effectively.

5.4 INCENTIVE-BASED THEORIES

In contrast to the natural rights and reward theories, the third argument for copyright is not based on ideas of what is right or fair to an author or creator; rather, it is based

[45] See A. Drassinower, 'Copyright Infringement as Compelled Speech', in A. Lever (ed.), *New Frontiers in the Philosophy of Intellectual Property* (2012), ch. 8; L. Biron, 'Public Reason, Communication and Intellectual Property', in Lever, op. cit., ch. 9; A. Barron, 'Kant, Copyright and Communicative Freedom' (2012) 31(1) *Law and Philosophy* 1.

[46] The best account is A. Drassinower, *What's Wrong with Copying?* (2015), who argues that this principle is already embodied in Canadian (and British) copyright law.

on an idea of what is good for society or the public in general. The incentive argument presupposes that the production and public dissemination of cultural objects such as books, music, art, and films is an important and valuable activity. It also presupposes that, without copyright protection, the production and dissemination of cultural objects would not take place at an optimal level. The reason for this is that while works are often very costly to produce, once published they can readily be copied. For example, while this textbook took a considerable amount of time and energy to write, once published it can be reproduced easily and cheaply. Consequently, in the absence of copyright protection, a competitor could reproduce Bently, Sherman, Gangjee, and Johnson's *Intellectual Property Law* without having to recoup the expense of its initial production. In so doing, they could undercut Oxford University Press. According to the incentive argument, if Bently, Sherman, Gangjee, and Johnson, and Oxford University Press were not given any legal protection, *Intellectual Property Law* would never have been written or published—and the world would have been a commensurably poorer place. The legal protection given by copyright is intended to rectify this 'market failure' by providing incentives that encourage the production and dissemination of works. In short, copyright provides a legal means by which those who invest time and labour in producing cultural and informational goods can not only recoup that investment, but also reap a profit proportional to the popularity of their work.[47]

Utilitarian arguments for copyright are commonly met with three criticisms. Some question whether an incentive is really necessary for much production, and certainly there are plenty of examples of practices of creation and dissemination of works that do not depend on the existence of copyright.[48] Others, admitting the need for an artificial incentive to rectify the market failure, question whether the grant of an exclusive property is the appropriate incentive.[49] After all, exclusive properties impose costs on people who wish to use the work, costs of policing rights and enforcement on owners, and transaction costs on those who seek permissions.[50] In some cases, in fact, exclusive rights are replaced by payments from general taxation (as with the public lending right discussed in Chapter 13), thus ensuring that authors are provided with an incentive, but that the costs associated with exclusive rights are minimized. Even if we accept that exclusive rights are the optimal form of incentive, the third problem with the utilitarian approach is deciding exactly what incentive is optimal: what should a copyright owner be able to prevent another person from doing and for how long?

[47] W. Landes and R. Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *JLS* 325; W. Gordon, 'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory' (1989) 41 *Stanford L Rev* 1343. For recent endorsement at international level, see Marrakesh Treaty, Recital 3 ('emphasizing the importance of copyright protection as an incentive and reward for literary and artistic creations').

[48] S. Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs' (1970) 84 *Harv L Rev* 281 (emphasizing, in particular, the incentives provided by lead time and possible use of contractual methods such as subscription); D. Zimmerman, 'Copyright as Incentives: Did We Just Imagine That?' (2011) 12 *TIL* 29; K. Darling and A. Perzanowski (eds), *Creativity Without Law: Challenging the assumptions of Intellectual Property* (2017). For suggestions that copyright rules be modified to reflect the workings of different incentives, see L. Loren, 'The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection' (2008) 69 *LA L Rev* 1 (suggesting that works not motivated by monetary incentive should receive less protection); S. Balganesh, 'Foreseeability and Copyright Incentives' (2009) 122 *Harv L Rev* 1569.

[49] R. Hurt and R. Schuchman, 'The Economic Rationale for Copyright' (1966) 56 *Am Econ Rev* 421 (suggesting private patronage and government support).

[50] See *Eldred v. Ashcroft* (2003) 123 *S Ct* 769, 804*ff* (Breyer J).

5.5 NEOLIBERAL ECONOMICS

If economic theory that sees copyright as an incentive to create or publish implies a rather narrow right, an alternative economic theory, associated with neoliberal economics, would justify protection of virtually all 'value'.[51] According to this school of thought, private ownership of resources is the juridical arrangement most conducive to optimal exploitation. In contrast, common ownership or non-ownership is likely to lead to over-exploitation (the so-called 'tragedy of the commons'). For example, it has been argued that failure to protect sound recordings by copyright would lead to their overuse, so that the public interest in the recordings would tire, and their value, diminish.[52] Accordingly, copyright protection should be limited only where the transaction costs involved in locating and negotiating licence agreements would prevent the conclusion of optimal agreements. These theoretical positions have not only featured in the arguments of scholars and treatise writers, and in the lobbying process, but have also even been adopted by some US courts.[53] However, the idea that copyright should be unlimited in coverage, scope, and duration because this will promote optimal use of intellectual resources seems to neglect a fundamental characteristic of intellectual products—namely, their 'non-rival nature'.[54] Fears about overexploitation of physical resources, which (might) make private ownership the most satisfactory allocative model, simply do not apply to cultural resources: the more people who can get access to the works of Shakespeare, Mozart, and even Jeremy Bentham, the better.

5.6 DEMOCRATIC AND REPUBLICAN ARGUMENTS

In an important intervention in 1996, Neil Netanel has tried to justify copyright by reference to the 'democratic paradigm'.[55] Netanel sees copyright as 'fortifying our democratic institutions by promoting public education, self-reliant authorship, and robust debate. More precisely, this democratic paradigm views copyright law as a 'state measure designed to enhance the independent and pluralist character of civil society'.[56] Copyright encourages greater production, but also 'is designed to secure the qualitative condition for creative autonomy and expressive diversity'.[57]

5.7 THE PLACE OF JUSTIFICATIONS

There is a large body of literature criticizing, developing, and refining these six justifications. There is not room here to recount and assess this literature further. Nevertheless, it is worth noting a number of points about the ways in which these theories are marshalled in support of legal arguments relating to copyright. It is often said that a natural

[51] For a concise, if unsympathetic, explanation, see N. W. Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 *Yale LJ* 283, 290, 306–7, 308–36.

[52] W. Landes and R. Posner, 'Indefinitely Renewable Copyright' (2003) 70 *U Chi LR* 471. For discussion of the empirical evidence refuting this, see Chapter 7, section 7, pp. xxx-yy.

[53] *Harper & Row Publishers Inc v. Nation Enterprises* 471 US 539 (1985).

[54] For a compelling critique, see M. Lemley, 'Ex Ante versus Ex Post Justifications for Intellectual Property' (2004) 71 *U Chi L Rev* 129.

[55] N. W. Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 *Yale LJ* 283, 291. For an argument that copyright diminishes diversity, see G. Pessach, 'Copyright Law as a Silencing Restriction on Non-Infringing Materials: Unveiling the Scope of Copyright's Diversity Externalities' (2003) 76 *S Cal L Rev* 1067.

[56] Netanel, op. cit., 291.

rights-based justification for copyright inevitably produces a different conception of copyright from that which results from an incentive argument. More specifically, it is argued that a natural rights conception of copyright leads to longer and stronger protection for authors (and copyright owners) than an incentive-based conception. This is because a natural rights argument for copyright is assumed to result in a form of property that is perpetual and unqualified.[58] In contrast, an incentive-based argument justifies the grant of only the minimum level of protection necessary to induce the right holder to create and release the work.

Although the various theories have relatively distinct philosophical pedigrees, when they have been employed in support of various claims, little, if any, attention has been given to such niceties. Instead, the six arguments are typically deployed side by side. In fact, in most cases in which a claim is made for the legal protection of works not previously protected (such as television formats or special rights for newspapers) or for the expansion of the rights conferred by the law in respect of such works, one can reasonably anticipate that all six types of justification will be used. While it is understandable that lobby groups use (or abuse) the various justifications to further their ends, more problems arise when people begin to believe the rhetoric, and assume that copyright law is determined and shaped by these philosophical ideals.[59]

6 INTERNATIONAL INFLUENCES

One of the constant themes in the history of British copyright law is that it has been influenced by foreign and international trends and developments. While the sources may have changed, contemporary law is no different. There are a number of international treaties that impact upon British copyright law.[60] Here, we will limit ourselves to the seven most significant treaties:[61] the Berne Convention; the Rome Convention; the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS); the World Intellectual Property Organization (WIPO) Copyright Treaty; the WIPO Performances and Phonograms Treaty; the Beijing Treaty on Audiovisual Performances; and the Marrakesh Treaty for the Visually Impaired.[62]

[57] Ibid., 339.

[58] See *Millar v. Taylor* (1769) 4 *Burr* 2303, 98 *ER* 201, 218–22 (Aston J), 252 (Mansfield CJ). However, if the processes of authorship are perceived as processes of a combination of existing texts, of *bricolage* and collocation, a natural rights approach might justify only a short-term and highly qualified 'property' in the resulting work.

[59] J. Litman, *Digital Copyright* (2001), 77 ('normative arguments . . . typically, change nobody's mind'); G. Austin, 'Copyright's Modest Ontology: Theory and Pragmatism in *Eldred v. Ashcroft*' (2003) 16 *Can J L Juris* 163 ('there are few instances where theory dictates . . . positive law'). For the suggestion that when real policy is negotiated the philosophical arguments are abandoned in favour of 'mid-level principles', see R. Merges, *Justifying Intellectual Property* (2011).

[60] Also important are the Universal Copyright Conventions (last revised at Paris in 1971), the Geneva Convention on Phonograms of 1971, and the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels, 21 May 1974).

[61] The leading texts are S. Ricketson and J. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edn, 2006); P. Goldstein and B. Hugenholtz, *International Copyright; Principles, Law and Practice* (3rd edn, 2012); S. von Lewinski, *International Copyright Law and Policy* (2008).

[62] The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled (2013).