

Creative copying: Law, politics and originality in a digital world

John Street

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Creativity, copying and copyright

- ‘The creativity of songwriting is actually being shut down by the way that the law is enforcing the idea that you can’t borrow, beg or steal. All songwriting is a process of borrowing.’ (Clinton Heylin, *Today Programme*, BBC R4, 11 June 2015)
- ‘I think we can tell a good copyright system from a bad one by what kind of work gets made under its rules’. (Doctorow, 2014: 153)

Digitalization and the music industry

- ‘The entire music industry is just another feature of the iPhone.’ (Nilay Patel, *The Verge*, 9 June 2015, following the launch of Apple Music)
- ‘Music is free now’ (New Statesman headline, 11 June 2015)



A free digital music industry?

	Analogue	Digital
Consumption	Physical sales (CDs, vinyl, tickets, merchandise). Ownership. Collecting.	Downloading, streaming. Sharing/renting. (But not free: subs, broadband, phones, etc)
Production	Record labels. Nurturing talent and repertoire. Income from physical sales and rights.	YouTube/iTunes/Spotify/Apple Music. Curating. Monetizing content: via advertising, subscriptions, mobile device sales
Creation	Albums, singles, artwork/concepts	Tracks, samples, syncs, photos, videos, exclusives...

Table adapted from Negus, 2015

Rights claims in the new music industry

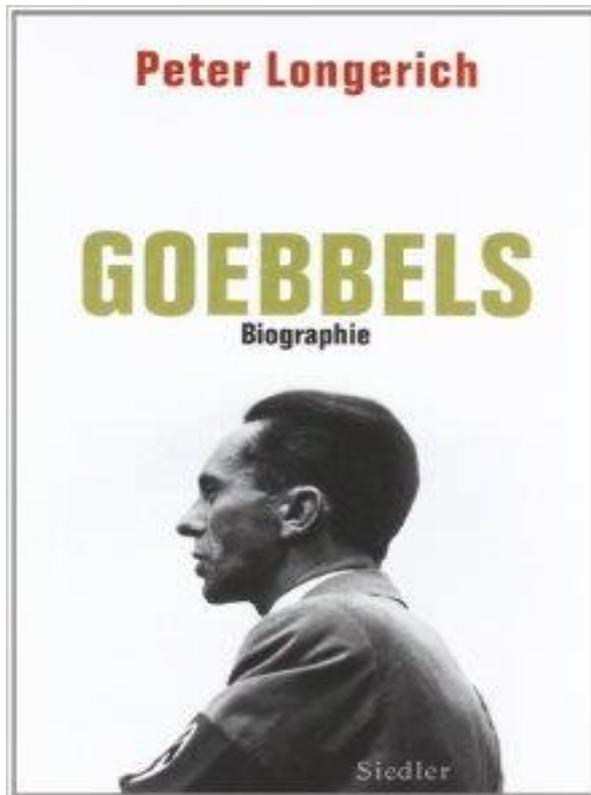
- ‘These emergent tensions in the digital economy, between production and consumption, between those whose profits are derived from producing music and those whose income is generated from exploiting the use of music as “content” are perhaps part of a longer narrative about tensions between creativity and marketing These conflicts are informed by widening disputes about “rights” ... These rights claims are underpinned by a series of ethical disputes about fairness and worth.’ (Negus, 2015: 155)

Background

- CREATE project on ‘Digitalisation and the politics of copying’ (with Keith Negus & Adam Behr)
- The construction and role of ‘originality’, ‘creativity’ and ‘plagiarism’ in the music industry
- Politics as ‘*who gets what, when and how*’ (Lasswell, 1936) and/or ‘*the collective choices that bind groups of people to live in a particular way*’ (Runciman, 2014)

The politics of copyright

- Goebbels and the Greens



Copyright and electoral politics

- ‘We need copyright laws that reward creators but that are consistent with digital technologies. Above all we want democratic political control of this technology. We would consider combining elements of the policies below into a comprehensive Digital Bill of Rights’ (Green Party Manifesto, 2015, p61)

Copyright and electoral politics

- 'We will protect intellectual property by continuing to require internet service providers to block sites that carry large amounts of illegal content, including their proxies. And we will build on progress made under our voluntary anti-piracy projects to warn internet users when they are breaching copyright. We will work to ensure that search engines do not link to the worst-offending sites' (p42)
- 'Support growth in the creative industries, including video gaming, by continuing to support the Creative Industries Council, promoting creative skills, supporting modern and flexible patent, copyright and licensing rules, and addressing the barriers to finance faced by small creative businesses.'(p37)

Copyright and electoral politics

- ‘A fair and balanced copyright regime that is suitable for the 21st century is an absolute necessity for the UK to remain competitive in a global economy that is built upon ideas and innovation. Copyright should give artists and innovators the chance to make money from their work; however, that needs to be balanced with the rights of society as a whole. We will work for copyright reform and reduce copyright terms to 10 years to balance everyone's needs.’ (UK Pirate Party, 2015)

Copyright and electoral politics

- Labour, SNP and UKIP policies on copyright



Political Constitutions

- US Constitution: ‘To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.’ (Art 1, Section 8, Clause 8)
- UN Declaration of Human Rights: ‘(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’ (Article 27)

Underlying political principles

- Competing claims
- Economic/utilitarian
- Public policy/social contract
- Natural law/moral rights
- (Stokes, 2003: 10-18; Rahmatian, 2011: 68-122)

Rights vs ends

- ‘Shifting the ethics for copyright from a utilitarian-based approach, which justifies property rights as necessary to further larger public goals, towards a natural rights framework, which justifies the grant of rights as natural entitlements, allows authorial and social rights in literary and artistic works to be allocated on principles of fairness and justice.’ (Ng, 2008: 424-425)

Which ends?

- ‘The law is enacted ... for the purpose of protecting of copyright of authors in their literary, artistic and scientific works and the rights and interests related to copyright, encouraging the creation and dissemination of works conducive to the building of a socialist society that is advanced ethically and materially, and promoting the progress of and flourishing of socialist cultures and sciences’ (Copyright Law of the PRC, Art. 1)
- The fate of the third phase (2012-) of copyright reform in China

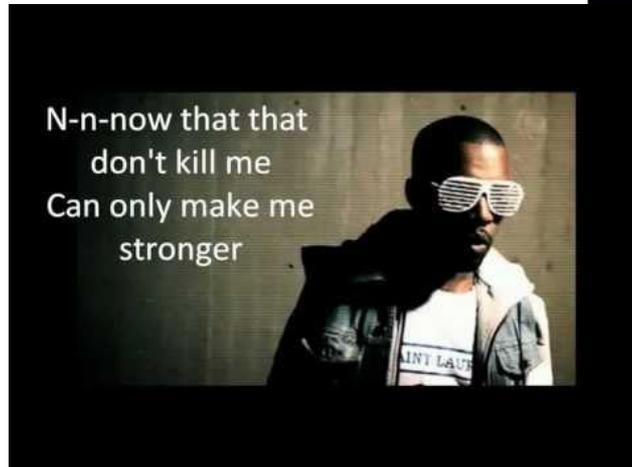
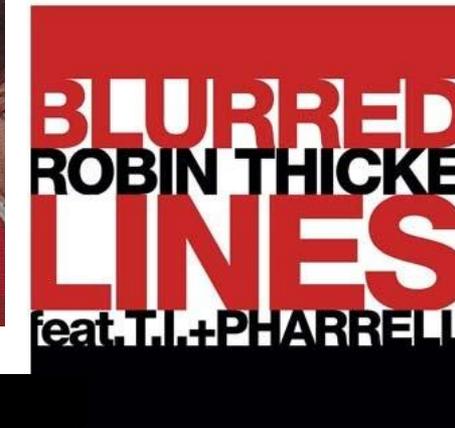
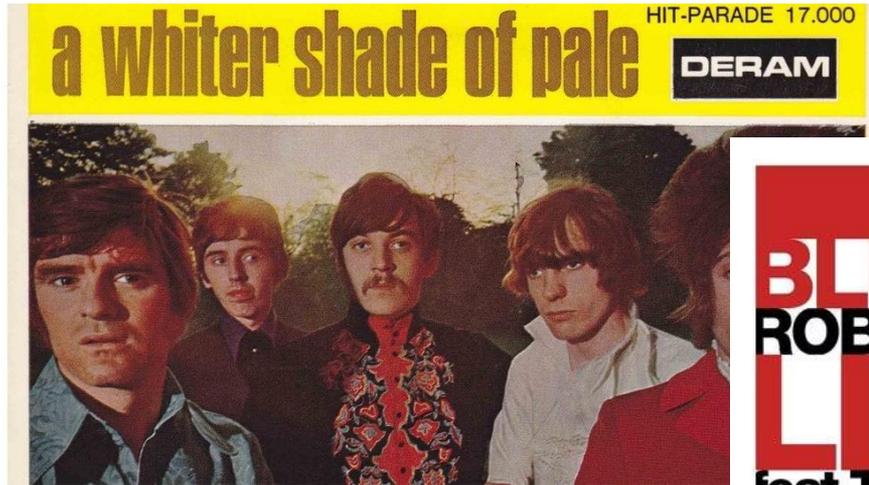
Making the law: the transnational dimension

- Global compliance (WTO/TRIPS) vs cultural/political integrity ('few forces could be as potentially destructive to China's political sovereignty as creativity' [Keane, 2009: 433])
- Political systems, policy processes and copyright reform: European Parliament (culture) vs European Commission (commerce) (Dietz, 2014)

Making the Law: the national dimension

- Agenda setting: 'A sports event as such is not a work of authorship under common principles of copyright law and all 28 Member States adhere to this view in their national legal systems' (quoted in Boyle et al, 2015, p4)
- Policy networks: 'Copyright ... has always been the creature of shifting political interests and cultural aspirations ... the shift from hands-off cultural policy that emphasizes free competition (copy and compete) to a more aggressive stance that protected capital investment in the name of economic growth' (Cummings, 2013: 3-4)
- Power struggles: within the Treasury, between BIS and DCMS, between corporates and creatives (Hesmondhalgh et al, 2015, forthcoming)

Implementing the law



Implementing the law

- The key terms: what constitutes an ‘original’ contribution (see Procul Harum case)
- The agenda: what is to be determined (see ‘Blurred Lines’ case)
- The criteria: ‘common sense’ assumptions about how creatives and creative industries operate (see Kanye West/’Stronger’ case)
- The method: judges, experts and juries

Implementing the law

- ‘British copyright law ... fails to take account of the realities of popular music-making and consumption ... it leaves little place for some contributions, while arguably over-valuing the significance of others.... [J]udicial deference to mainstream musicological thinking ... is at least one of the main reasons for the privileging of some kinds of contributions over others’ (Bently, 2009: 195)

Whose rights? Fair to whom, for what?

- Creators (songwriters, musicians, producers, arrangers, etc), labels, streaming services, audiences...
- An economy or a (democratic) political system?

Whose rights? Fair to whom, for what?

- ‘The content creators are the foundation of the whole thing and if you cut them off, if you cut off the water supply, the whole thing falls over and all we’ll be looking at is cat videos with no music’ (Vicky Bain, BASCA, interview November 2014)
- ‘Copyright law discriminates against sampling’ (McLeod and DiCola, 2011: 16)

Whose rights? Fair to whom, for what?

- ‘We are ... astounded that you question whether the various collecting societies ... that license our creative works really reflect our interests’ (Jean Michel Jarre [CISAC], letter to Julia Reda, MEP, 2015)
- ‘Of course, we agree that there needs to be a balance achieved between rights holders and the public. But this balance should not be struck at the cost of the increasingly fragile community of creators’ (Jarre, op cit.)

Whose rights? Fair to whom, for what?

- ‘I believe [that] if you are a fan of music then you have a duty, once you like that music, to buy that music’ (Musician, interview, October 2013).
- ‘I never see it (my music) as having monetary value. It has a lot of emotional value; it has a lot of cultural value in some respects. I want people to enjoy it and get something from it.’ (Musician, interview, August 2013).
- ‘Why would you get the same session fee for basically reproducing what you're given, than creating a part for yourself?’ (Musician, February 2014)

So what?

- ‘I think we can tell a good copyright system from a bad one by what kind of work gets made under its rules’. (Doctorow, 2014: 153)
- Or
- ‘I think we can tell a good copyright system from a bad ones by what kinds of political principle inform its rules, how decisions are made, and which stakeholders participate in and influence the process.’