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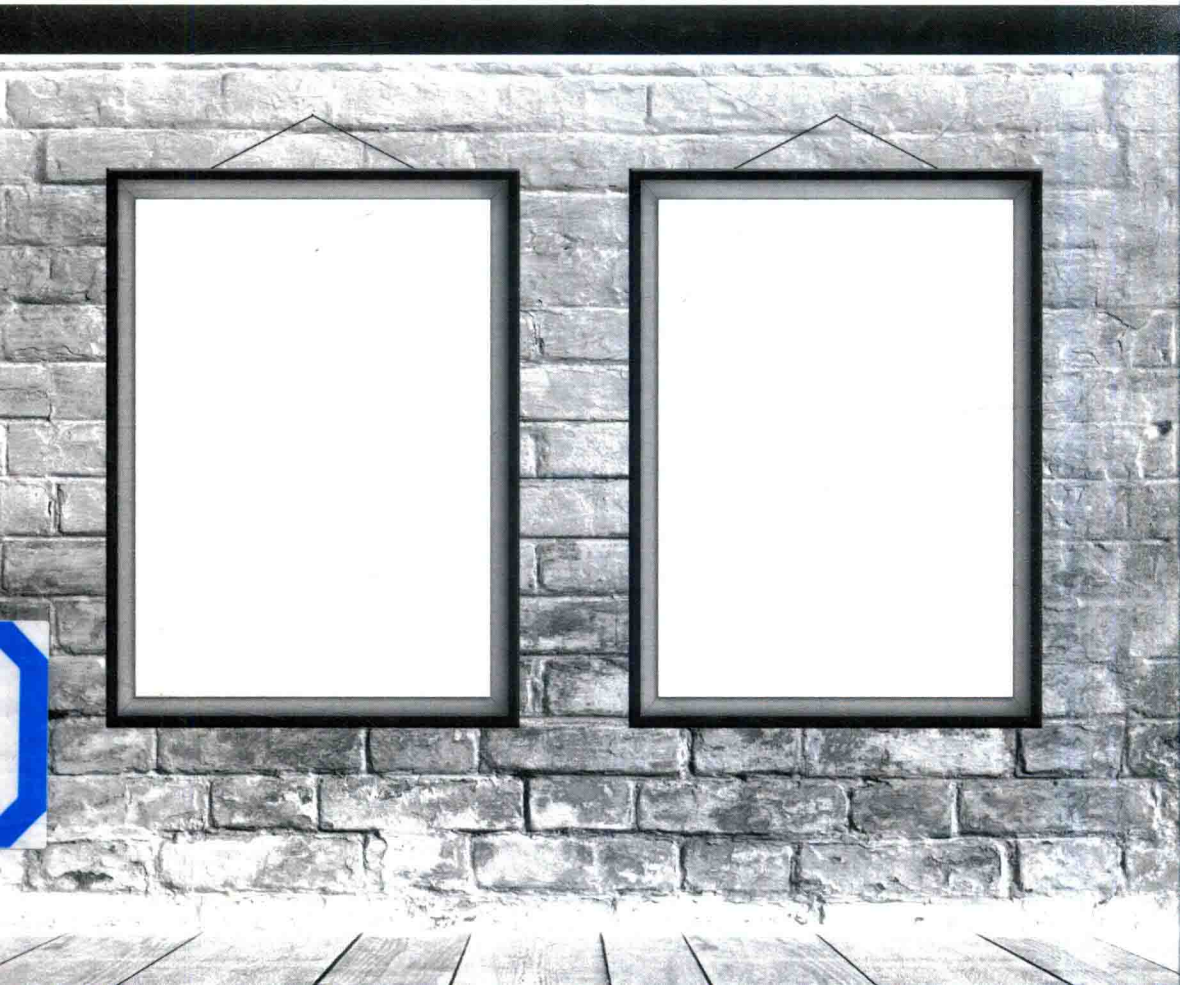
EDITED BY HELLE PORSDAM

Copyrighting Creativity

Creative Values, Cultural Heritage Institutions and Systems of Intellectual Property



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Edited by

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Introduction

Helle Porsdam

Is copyright the 'elephant in the room' these days?[1] Do issues concerning intellectual property (IP) protection come up in an ever-increasing number of both discourses and popular practices involving culture and cultural heritage? This volume of essays argues that this is indeed the case. Its contributors are scholars from both the humanities and the social sciences – from cultural studies to law – as well as cultural practitioners and representatives from cultural heritage institutions who share an interest in the contribution of IP to the role of these institutions in making culture accessible and encouraging new creativity.

The move from cultural theory and innovation to cultural practice inevitably involves legal protection and, historically, IP has often lagged behind new technological breakthroughs. This is true not least in the digital age and has led to various problems concerning the impact of new technologies and digital media on knowledge production on the one hand, and contemporary modes of production of cultural goods, the reception and safeguarding of cultural heritage and the dissemination of knowledge about culture on the other.

Digitisation expands the horizon of creative possibilities and in so doing puts pressure on the viability and applicability of legal regimes that were constructed for an analogue world. New forms of collaboration emerge in internet-based fan communities as well as in the arts, sciences and humanities. These developments are at the very core of contemporary culture and have an impact on individuals as well as institutions.

The incarnation of creativity and innovation in practice, cultural heritage institutions are significant stakeholders in the new digital information infrastructures. For the past two decades, they have accordingly involved and engaged themselves actively in various debates – scholarly as well as public – concerning copyright and cultural heritage. The same cannot be said for humanities scholars who, though recognising the seminal role of these institutions in the presentation of culture, as the collective memory of society and in stimulating new creativity and innovation, have too often allowed cultural heritage institutions to remain on the periphery of scholarly debates concerning copyright.

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1 I owe this wonderful suggestion to Professor Evelyn Welch, Vice-Principal for Arts & Sciences and Professor of Renaissance Studies at King's College London. At a conference a couple of years ago, she mentioned how copyright issues keep coming up in relation to her own research focus on material culture, early modern consumption and the social and economic dynamics of fashion in Europe between 1500 and 1700.

With this volume of essays and with CULTIVATE we hope to change this. The name given to 'Copyrighting Creativity: Creative Values, Cultural Heritage Institutions and Systems of Intellectual Property', CULTIVATE is/was a three-year research collaboration (2010–13) between the universities of Copenhagen, Uppsala, London, Utrecht and Iceland. I was the Project Leader and my partners were: Professor in Library and Information Science Eva Hemmungs Wirtén from Linköping University (formerly Uppsala University); Professor of Law Fiona Macmillan, Birkbeck School of Law, University of London; Professor of Intellectual Property Madeleine de Cock Buning and Assistant Professor Lucky Belder, both at the Centre of Intellectual Property Right (CIER), University of Utrecht; and Associate Professor of Folklore/Ethnology Valdimar Tr. Hafstein, University of Iceland.

A project under HERA (Humanities in the European Research Area which is a partnership between Humanities Research Councils across Europe and the European Science Foundation), CULTIVATE is/was part of the first HERA Joint Research Programme for the theme 'Humanities as a Source of Creativity and Innovation'. Our common research question was this: 'What is and what ought to be the relationship between creativity, cultural heritage institutions and copyright?'

In order to get the best possible advice on how to answer this research question we invited relevant experts to the Tate Modern, London (one of our external partners) in late April 2013 for our final conference. The present volume is based on the talks given at this conference as well as on the work done within CULTIVATE.

Like CULTIVATE, the volume is European focused. We made the deliberate choice, while writing our application for HERA, that we wanted to target our research specifically towards Europe (and European concerns). Beyond the obvious fact that HERA concerns humanities in the European research area, this also had to do with the many recent publications that address issues relating to the historical and contemporary anxieties of authorship and ownership for indigenous collections. As the great interest in these anxieties shows, they are pressing and need our attention. We do therefore address them in this volume – especially in the introduction and in the first part, but also in some of the later parts – but they do not form the centre of attention, as they are covered so convincingly elsewhere.[2]

There is a large amount of literature out there on each of our three core themes: copyright/IP, creativity and innovation, and cultural heritage (institutions). Our volume is different from the majority of this literature in that it attempts to link these areas – and to discuss and analyse the relationship between them. Culture, cultural heritage and cultural rights are the crux of this relationship. Often referred to as 'the poor cousin' of human rights, cultural rights are an area of human rights in which people – scholars as well as the general public – are becoming more and more interested. Human rights and IP is one of the most challenging topics to emerge within human rights debates, moreover – a reflection, in our current

2 See e.g., Coombe, Wershler and Zeilinger (2014) which especially deals with the Canadian context, but whose authors address a broader set of issues too.

knowledge societies or economies, of the importance of cultural issues, especially as these relate to identity and cultural pride. 'Human rights and intellectual property', writes Paul Torremans in the Foreword to his edited volume *Intellectual Property and Human Rights* from 2008, for example, 'is clearly a field in full expansion and development' (Torremans, 2008: xxiv).

The present volume may be viewed as a part of this recent trend – but it also looks at the cultural issues involved from a non-legal perspective. Reflecting the fact that both the CULTIVATE team and the contributors to our volume come from different academic disciplines, our volume is very much an interdisciplinary endeavour – and as such may also say something important about what each one of our particular disciplines can add to the general picture.

The Major Issues and the Nine Chapters

In addition to this introduction, the volume consists of nine chapters and an epilogue, and is divided into three thematically different, yet overlapping parts: (I) *Who owns culture: Cultural heritage institutions and copyright*; (II) *The Arts, Literature, Design and Copyright*; and (III) *Creativity, Authorship, Copyright and the Public Domain*.

Part I: Who Owns Culture: Cultural Heritage Institutions and Copyright[3]

When it comes to cultural heritage – to the legacy of physical artefacts and intangible attributes of people and groups – it is interesting to note that whereas 'Transnational studies' are currently very popular within both the humanities and the social sciences, the policies of most source nations and the international dialogue about cultural property are becoming ever more regional and/or nation-oriented. This calls into question the (transnational) principle of cultural artefacts as the legacy of all humankind that is expressed in numerous UNESCO documents.

Most often, since the 1970s when restitution of cultural heritage started to become a very hot international political issue, the debate was concerned with antiquities or the stolen treasures of the ancient world. As former colonies sought independence, they would try to reclaim their own history by asking to have the artefacts returned that physically tie them to it. The core question is: Whose culture is it? And the underlying issue is one of identity and of the right to reclaim the objects that are its concrete symbols. Are cultural artefacts the common heritage of us all in an interconnected world? Or do encyclopaedic museums such as the

3 I wish to thank my CULTIVATE partners for allowing me to draw on their respective contributions to the Pecha Kucha we performed at the Tate Modern conference in London in April 2013.

British Museum that embody this idea of the oneness of humanity only pay tribute to Western ways of thinking?

In the European context, the demand for the 'repatriation' of cultural objects has been expressed in sometimes very strange ways. One example is the nationalistic Danish People's Party and its fight to have one of the earliest Danish laws, the so-called Jutlandic Law from 1241, repatriated from the Swedish Royal Library. Modern historical research has shown that this old manuscript was either purchased or given to the Swedes in the 1720s. But such historical fact has not interested the Danish People's Party who has invented its own story of the Jutlandic Law as spoils of war and has used a postcolonial discourse to argue that these Danish artefacts contain an invaluable part of Denmark's history and identity and therefore really do belong in Denmark.[4]

For indigenous peoples and other minorities something slightly different, though in many ways related, is at stake: the distinctive rights to their intangible cultural heritage. These communities are increasingly concerned with the misappropriation by, for example, international companies of their traditional knowledge, and they have seized on IP as the forum in which to protect their cultural heritage. Their claims for IP are voiced in terms of identity politics, cultural survival and human rights and 'these new claims for intellectual property understand rights not just in the familiar terms of incentives-for-creation, but also as tools for both recognition and redistribution' (Sunder, 2006: 273). These claims force the international legal and political system to pay more attention to potential violations of the cultural rights of minorities and indigenous peoples as well as to articulate the principles through which traditional knowledge and traditional cultural expressions may best be recognised and protected.

There is something ironic about the fact that, today, there are basically two groups who are interested in copyright (and IP) *expansion*: exploiters (companies and corporations) who use copyright expansion as a mechanism to protect investment, and indigenous peoples who seek to protect their traditional knowledge. These are strange bedfellows – the more so as everyone else works towards *limiting* IP extension. Future IP fights will be about finding the right balance between these different claims. In and of itself, each one of the claims is legitimate and understandable enough; in practice, however, they cannot be seen in isolation, but must be weighed against each other so that a fair solution can be found for everyone involved. Cultural rights of one kind or another will be invoked both by the 'free culture' and 'access to knowledge' proponents and by those who have the best interest of indigenous groups in mind – the problem being that these rights sometimes work against each other.

The protection and promotion of cultural diversity is an issue here. The European Treaty specifically mentions respect for cultural and linguistic diversity, for example, just as it states that Europe's cultural heritage should be safeguarded and enriched. The promotion of *Europeana*, the European Digital Library, is one

4 I talk about this case in Porsdam (2012b).

way to achieve this. *Europeana*'s aim is to reach full disclosure of the European cultural heritage by 2025. The estimated costs are a hundred billion Euro – one reason being the costly nature of copyright.

Cultural contents to which no rights apply is in the public domain. Public domain contents may be digitised and disclosed online without legal obstacles, but content protected by copyright is in the private domain. The process of finding rights holders and clearing copyright is both expensive and time consuming. The legal framework for the protection of cultural contents in the EU is the *Acquis Communautaire* which consists of nine directives harmonising the national laws of the 28 EU Member States. One of the most important of these directives is the *Information Society Directive* from 2001 which is sadly outdated at this point – being inefficient and waiting to be revised. It states, among other things, that *reproduction* and *communication to the public* are exclusive rights of copyright holders, that digitisation is reproduction, and that disclosing digital material online constitutes a form of communication to the public. The *Information Society Directive* furthermore states that such disclosure may not be undertaken by cultural institutions without permission, unless an exception applies which is implemented in national law.

The EU *Acquis* lists one mandatory and twenty-one optional copyright exceptions. These latter allow for instance 'private copying', certain forms of reproductions by cultural heritage institutions as well as the use of works for educational or scientific purposes, but they do not provide a blanket exception for digitisation and online disclosure of cultural contents. This creates a major challenge for institutions who are confronted with the responsibility to seek permission for digitisation and online disclosure of cultural contents. It is but one example of the fact that the *Acquis* is not keeping pace with all the new technological developments of our information society.

It is interesting to note, furthermore, that non-EU rules can also be relevant for the digitisation of cultural heritage in the EU. For example, digitisation and disclosure of heritage in Dutch cultural heritage institutions, stemming from Indonesia – a former Dutch colony, now part of the emerging ASEAN Union – may be subject to Indonesian rules. Thus, according to the Indonesian Copyright Act 'commonly owned' cultural content is copyright protected perpetually, and the State is the copyright holder. Foreign users must ask permission from the State in order to reproduce and publish these works. These provisions seem to implicate both that EU heritage institutions may not digitise and disclose online Indonesian heritage which is part of their collections, and that these digital reproductions are intended to be accessed in Indonesia.

Part I consists of Chapters 1, 2, 3 and 4. Chapter 1, 'Two Doctrines of and for Cultural Property: How Europe and America Are Different', concerns the resurgence within the past three decades of national and native claims to artefacts held by heritage institutions in Western metropolises. Martin Skrydstrup asks what form of property museum objects embody, how we should understand the coming into being of the institution of 'cultural property' and the contemporary praxis of

'retention', 'return', 'restitution', and 'repatriation'? Or, to slightly rephrase the question at the centre of this volume of essays: What is and what ought to be the relationship between cultural/artistic productions past and present, museums and cultural property?

In his doctoral research, Skrydstrup interrogated these interrelated questions vis-à-vis two distinct cultural property polities: the American NAGPRA regime, which is renowned for its uniform legalistic approach, and the Danish ad hoc ethical modality, which has come to be known under the rubric of UTIMUT. His archival and ethnographic research focused predominantly on the 'experts' of each regime trusted to make findings and deliberate disputes. What emerged was two distinctively different technologies of recognition of claimants; where NAGPRA grappled with definitions of indigeneity, specifically with regard to Hawaii, UTIMUT circumvented this question and only recognised other metropolitan museums as legitimate claimants. Skrydstrup found that the undergirding doctrine of NAGPRA was restoration of 'prior possessions', whereas in UTIMUT the operating modality was 'patrimonial partage', i.e. a form of division of collections, according to curatorial criteria of preservation and display. In this chapter, he juxtaposes and elaborates on these different concepts of cultural property in the US vs. Europe and argues that the gateway to their understanding goes through the nature of transactional orders within each polity. Furthermore he argues that such transactional orders simultaneously expose the guilt and consciousness of the postcolonial nation-state and offer prospects for State legitimacy by way of redeeming colonial legacies.

Chapter 2 offers a discussion by Lucky L. Belder on 'Museums Revisited: The Position of the Museum in the New Governance of the Protection of Cultural Heritage and Cultural Diversity'. In general, Belder notes, the European Union aims for an ever-closer EU and for more welfare for all. The Lisbon Treaty specifically talks about respect for cultural and linguistic diversity, just as it states that Europe's cultural heritage should be safeguarded and enriched. The plan for Europe 2020, the EU's growth strategy for the coming decade, is to support new information *technologies* that may in turn support sustainable growth, competitiveness and social development (http://ec.europa.eu/europe2020/index_en.htm).

But what is information technology without CONTENT, Belder asks? What is the role of museums, archives and libraries in providing sustainable access to cultural heritage? And what does Unity in Diversity mean considering the modest nature of European cultural politics? What is the relation between EU politics on the single market, on the one hand, and the mainstreaming of the support for cultural diversity, on the other? And why is it that at one and the same time, cultural diversity is considered a strength that will support the dynamics of our societies, but also as something that is under siege and urgently needs protection?

In Chapter 3, 'Libraries, Creativity and Copyright', Darryl Mead and Fred Saunderson argue that by holding and giving access to everything that has gone before, our cultural heritage institutions, especially our national libraries, will have an increasing role in supporting future creative work. National libraries are

the institutions with the capacity to collect (from) the worldwide web; they have already collected the world's printed output for more than 300 years, as well as sound and vision for over a century. Most extraordinarily, they can help you find virtually anything and then give all of us access to it for free.

Libraries have much larger collections than other cultural heritage institutions, Mead and Saunderson remind us. Library collections include both fact and fiction. Most of the material in a library has been interpreted, and the present has been built from past creative processes. The library provides a map of nearly all ideas from all of history. The library is the holder of all of the publicly available information in the world – in patent terms, it is the holder of all prior art. Everything in the library is available as the basis of future creative work. The biggest constraint for the vision of delivering a creative future is not a lack of funding, it is copyright, according to Mead and Saunderson. Chapter 3 explores the intricate relationship between creators' rights, our collective heritage and the future role of libraries in supporting and enabling creative endeavour to flourish.

Moreover, in the digital era where the book, thanks to ubiquity of electronic copies is not a scarce resource anymore, libraries find themselves in an extremely competitive environment, where several different actors are in a position to store and provide low cost access to a large number of documents. One type of these competitors is shadow libraries, piratical text collections which by now have amassed electronic copies of millions of copyrighted works and provide access to them usually free of charge to anyone around the globe. While such shadow libraries are far from being universal, they are able to offer certain services better, to more people, under more favourable terms than most public or research libraries. In Chapter 4, 'Libraries in the post-scarcity era', Balázs Bodó offers insights into the development and the inner workings of one of the biggest scientific shadow libraries on the internet to understand what kind of library people hack together for themselves if they have the means, and if they don't have to abide by the legal, bureaucratic and economic constraints that library innovation usually faces. He argues that one of the many possible futures of the library is hidden in plain sight in the shadows, and those who think of the future of libraries can learn a lot from book pirates of the twenty-first century about how texts in electronic form can be stored, organised and circulated.

Part II: The Arts, Literature, Design and Copyright

One of the questions pervading the relationship between copyright law and the 'arts' (including, for present purposes, literature and design) is that of constitution and authorisation. Does some generally accepted definition of what amounts to the 'arts' constitute and authorise the subject matter of copyright or, on the other hand, does copyright law constitute and authorise concepts of what are the 'arts'? It increasingly appears that copyright law defines, controls or affects the meaning of 'arts' in the broader social and cultural spheres. This very effect is evident in

the way in which arts festivals, for example, tend to brand themselves according to copyright categories as literary festivals, film festivals, music festivals, theatre festivals, dance festivals, despite the fact that almost no arts festivals confine themselves to only one artistic form.

Both tangible and intangible cultural heritage are objects of protection under international law, yet as a concept, they remain notoriously difficult to define precisely. Copyright is a private property right whereas cultural heritage rights are enjoyed in community. The international conventions on the protection of intangible cultural heritage do not seem to envisage the need for any limitation on the extensive private property rights wielded by copyright owners, though. If there is any point to cultural heritage rights, it must be to limit the privatisation of cultural heritage through copyright. But, in reality, copyright suffocates cultural heritage since it is a formalised technique of private appropriation of intangible cultural property. All the rules here seem to be set by the copyright regime, which has spawned the idea of the public domain in order to explain its relationship to everything else that exists in intellectual space. When IP rights are used as a technology to appropriate intangible cultural heritage then, so far as copyright is concerned, what it consequently privatises is taken from the IP domain. Under these circumstances, much depends upon the geography and architecture of this public domain.

The public domain has been invented by IP scholars in order to attempt to explain and understand the limits on IP's colonisation of intellectual space. But the basic problem with the public domain (apart from the fact that it is an imaginary space) is that it is more or less lacking in any legal architecture. It has been imagined only as the place where there are no IP rights, only as a place defined by absence. So, if we pull the arts, literature and/or design out of the propertised zone of intellectual space on the basis that cultural heritage as a community right does not belong there, then this may have the effect of leaving their contents completely unprotected. Instead of being a suspension in time and space, their contents simply become a free-for-all for all time.

Legally speaking, what is needed therefore is a kind of legal architecture in the public domain that: (a) recognises that some things can never be privately owned because of their cultural (heritage) significance; and, (b) develops the concept of group and communal rights, belonging to less than the public as a whole, bounded by property on the outside, but inside promoting freedom and space for creativity, innovation, and cultural conservation. This concept of the bounded creative community would recognise a legal suspension of the copyright regime that mirrors the temporal and spatial suspension of the arts, literature and/or design while preserving the incentive for creativity through the exercise of rights against those outside their temporal and spatial boundaries. In the end, then, this is not just an argument about suspension, but also one about balance: balance between the community rights in cultural heritage and the private rights in copyright; and balance between the regular order of life and the rupture inherent in the 'collective

effervescence' (Durkheim, 1912/1954, quoted in Sassatelli, 2008: 18–19) of the arts, literature and design.

Part II consists of Chapters 5, 6, and 7. As the title of Chapter 5 implies, 'Arts Festivals as Cultural Heritage in a Copyright-Saturated World' concerns the way in which many of the activities that occur as part and parcel of arts festivals can be mapped onto existing categories of copyright works. Indeed, argues Fiona Macmillan, so powerful is the rhetoric of these categories that there is a question about the extent to which they have constituted the very idea of 'arts' in this context, so that festivals typically identify themselves as film festivals, musical festivals, theatre festivals and so on, even if in fact empirical research reveals that almost no festivals confine themselves to only one form of 'artistic' output (Macmillan, 2013c). It would, therefore, be tempting to treat festivals as being just like any other form of distribution of copyright protected works. Turan, for example, argues that film festivals, at least, are an alternative form of distribution for films that have failed to find the usual commercial outlets for distribution (Turan, 2002: 7–8). This observation might also hold good for musical festivals given that there are particular constraints on commercial distribution in both the film and music industries which, like all constraints, are likely to produce a drive for alternative means of fulfilling desire.

However, maintains Macmillan, limiting our understanding of festivals to being merely another means of distribution is really limiting our understanding of the nature of arts festivals and their social, political and economic significance. While it is undoubtedly true that arts festivals, particularly some arts festivals, produce economic value for the entertainment industries, they also encompass a range of other values that are less easily measured but nevertheless present. Chapter 5 argues that arts festivals should be recognised as a form of cultural heritage. If this case can be made out, then it raises a problem: that the public and communal values of arts festivals as forms of cultural heritage appear to be in potential conflict with the intellectual property rights that saturate the arts festival environment.

Stina Teilmann-Lock is the author of Chapter 6, 'The Artfulness of Design: Copyright and the Danish Modern Inheritance'. She discusses a 1961 Danish Supreme Court ruling which said that a set of cutlery was an original work protectable by copyright, notwithstanding its being 'neither unique nor innovative'. The 'low' originality requirement for design must have as its concomitant a narrow scope of protection. Hence, to this day, only a 'close imitation' of a design would amount to copyright infringement. In this way, Teilmann-Lock explains, Danish law resolves the problem that arises from the fact that in any design the form is always conditioned by its function. Too rigid an interpretation of protection – and too broad an interpretation of copying – might have the undesirable effect of creating a monopoly on, say, stackable chairs, soup spoons or toothbrushes.

The Danish solution is now in jeopardy, however. Case C-145/10 Painer (2011) does not allow for inferior protection of any type of original work. In her chapter, Teilmann-Lock considers what may be the effect of such a change on design law in