

**COPYRIGHT AND THE CHALLENGE
OF THE NEW**

**Editors:
Brad Sherman and Leanne Wiseman**



Wolters Kluwer
Law & Business

Copyright and the Challenge of the New

Editors

Brad Sherman

Leanne Wiseman



Wolters Kluwer
Law & Business

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3669-5

© 2012 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

Copyright and the Challenge of the New

Information Law Series

VOLUME 25

General Editor

Prof. P. Bernt Hugenholtz
Institute for Information Law
University of Amsterdam

The titles published in this series are listed at the back of this volume.

List of Editors and Contributors

Graeme Austin, Professor of Law at Melbourne University Law School; Chair in Private Law, Victoria University of Wellington.

Lionel Bently, Herchel Smith Professor of Intellectual Property, Faculty of Law, University of Cambridge.

Kathy Bowrey, Faculty of Law, University of New South Wales.

Oren Bracha, University of Texas, School of Law.

P. Bernt Hugenholtz, Professor of Intellectual Property Law and Director of the Institute for Information Law (IViR) at the University of Amsterdam.

Johnson Okpaluba, Visiting Lecturer, King's College, London.

Pamela Samuelson, Richard M. Sherman Distinguished Professor of Law, University of California, Berkeley

Brad Sherman, Law School, Griffith University.

Leanne Wiseman, Law School, Griffith University.

Summary of Contents

CHAPTER 1	
Copyright: When Old Technologies Were New	1
<i>Brad Sherman and Leanne Wiseman</i>	
CHAPTER 2	
'The World Daguerreotyped: What a Spectacle!' Copyright Law, Photography and the Economic Mission of Empire	11
<i>Kathy Bowrey</i>	
CHAPTER 3	
The Electric Telegraph and the Struggle over Copyright in News in Australia, Great Britain and India	43
<i>Lionel Bently</i>	
CHAPTER 4	
The Phonogram: A Tale of Vested Interests and Seized Opportunities	77
<i>Johnson Okpaluba</i>	
CHAPTER 5	
Radio: Early Battles over the Public Performance Right	115
<i>Graeme Austin</i>	
CHAPTER 6	
How Did Film Become Property? Copyright and the Early American Film Industry	141
<i>Oren Bracha</i>	

CHAPTER 7	
The Story of the Tape Recorder and the History of Copyright Levies	179
<i>P. Bernt Hugenholtz</i>	
CHAPTER 8	
Making Copies: Photocopying and Copyright	197
<i>Leanne Wiseman</i>	
CHAPTER 9	
Public Ownership of Private Spectacles: Copyright and Television	221
<i>Brad Sherman</i>	
CHAPTER 10	
A Square Peg in a Round Hole? Copyright Protection for Computer Programs	251
<i>Pamela Samuelson</i>	

Table of Contents

CHAPTER 1	
Copyright: When Old Technologies Were New	1
<i>Brad Sherman and Leanne Wiseman</i>	
CHAPTER 2	
‘The World Daguerreotyped: What a Spectacle!’ Copyright Law, Photography and the Economic Mission of Empire	11
<i>Kathy Bowrey</i>	
§2.01 Controversial Technology	12
§2.02 The Conventional Legal Story	13
§2.03 The World Daguerreotyped	17
§2.04 Supporting Commodification	20
[A] Commissioner and Purchaser Rights	20
[B] Photographers as Authors	25
§2.05 Entrepreneurialism in the Colonies	31
[A] The Colonial Victorian Copyright Act 1869	33
§2.06 Rationales for Legal Protection of Photographs	39
§2.07 Conclusion	41
CHAPTER 3	
The Electric Telegraph and the Struggle over Copyright in News in Australia, Great Britain and India	43
<i>Lionel Bently</i>	
§3.01 The Electric Telegraph as a New Technology	45
§3.02 Australia: The Beginning of Copyright in News and the Tyranny of Distance	51
§3.03 The United Kingdom: News Copyright and the Repeal of the Stamp	55

§3.04	India: News Copyright and Colonial Politics	69
§3.05	Conclusion: Reflections on Copyright and Technology	75
CHAPTER 4		
	The Phonogram: A Tale of Vested Interests and Seized Opportunities	77
	<i>Johnson Okpaluba</i>	
§4.01	Introduction	77
§4.02	Pre-mechanical Music and Industry Practice	78
§4.03	The Development of Sound Recording	79
§4.04	The Berne Convention	84
§4.05	The State of the Law in the United Kingdom	86
§4.06	Reform of United Kingdom Copyright Law	88
§4.07	Sheet Music Piracy	94
§4.08	Revision of the Berne Convention: Berlin Conference 1908	96
§4.09	The Gorell Committee	100
§4.10	The Phonogram Manufacturers Case for a Compulsory Licence	102
§4.11	Copyright Protection for Phonograms	103
§4.12	The Copyright Bills 1910–1911	104
§4.13	Conclusion	112
CHAPTER 5		
	Radio: Early Battles over the Public Performance Right	115
	<i>Graeme Austin</i>	
§5.01	Introduction	115
§5.02	Nascent Technology to Cultural Phenomenon	117
§5.03	Battles over the ‘Public Performance’ Right	123
	[A] <i>Courtroom Battles</i>	124
	[B] <i>The Legislative Battleground: Senate Bill 2600 (1924)</i>	128
	[C] <i>Contemporary Lessons from Early Debates over Licensing</i>	135
§5.04	Conclusion	140
CHAPTER 6		
	How Did Film Become Property? Copyright and the Early American Film Industry	141
	<i>Oren Bracha</i>	
§6.01	Technology Becomes (Show) Business	144
§6.02	Business Becomes Property: Motion Pictures Enter Copyright’s Domain	152
§6.03	Trespassing Film: Copyright’s Scope	166
§6.04	Conclusion	177

Table of Contents

CHAPTER 7

The Story of the Tape Recorder and the History of Copyright Levies	179
<i>P. Bernt Hugenholtz</i>	

§7.01	Introduction	179
§7.02	The History of Magnetic Recording and the Pre-history of Levies	180
§7.03	The German Tape Recorder Cases	183
§7.04	The Introduction of Copyright Levies in Germany	188
§7.05	Proliferation of Levies Across the World	191
§7.06	Conclusion: Lessons from the Past	194

CHAPTER 8

Making Copies: Photocopying and Copyright	197
<i>Leanne Wiseman</i>	

§8.01	Introduction	197
§8.02	Reactions to the Photocopier	200
§8.03	Towards a Copyright Solution	203
§8.04	Improving Access to Information	204
§8.05	Decentralized Copying	214
§8.06	Conclusion	218

CHAPTER 9

Public Ownership of Private Spectacles: Copyright and Television	221
<i>Brad Sherman</i>	

§9.01	Introduction	221
§9.02	'When Too Much Sport Is Never Enough'	222
§9.03	Legal Control of the Televising of Spectacles	230
§9.04	The Association for the Protection of Copyright in Sport	233
§9.05	Breaking the Broadcast Deadlock	236
§9.06	Conclusion	248

CHAPTER 10

A Square Peg in a Round Hole? Copyright Protection for Computer Programs	251
<i>Pamela Samuelson</i>	

§10.01	Perceived Weaknesses in the Economic and Legal Cases for Protecting Computer Programs	252
§10.02	From CONTU to TRIPS: How Copyright Became an International Norm for Software Protection	255
§10.03	From Literary Works to Functional Writings: Evolving Conceptions of Computer Programs in the Copyright Caselaw	259

§10.04	Is Copyright Responsible for the Software Industry's Success?	265
§10.05	Concluding Thoughts	270

CHAPTER 1

Copyright: When Old Technologies Were New

Brad Sherman and Leanne Wiseman

Any changes in copyright law should be drafted in the spirit of the astronauts... with our eyes and thoughts fixed firmly on the future.¹

One of the most interesting and, at the same time, one of the most challenging things about copyright law is that it is constantly subject to change. While this is the product of a number of factors including shifts in fashion, cultural change, economic fluctuations, war and colonial expansion, one of the key reasons why copyright law has continually been confronted by the challenge of the new is because it is, and has always been, a creature of technology. From the printing press, the telegraph and the camera, through to the phonogram, the photocopier, the tape player, the personal computer and the internet, technological developments have always driven and shaped copyright law. As well as creating new types of potential subject matter, technology has also provided new ways to reproduce, distribute and consume copyright works.

One of the aims of this book is to shed some light on the way that copyright law has responded to and interacted with different technologies. To this end, each of the chapters focuses on a specific technology or group of technologies. In approximate chronological order these are photography, telegraphy, radio, film, the photocopier, the tape player, television and computer programs. While each of the chapters focuses on a different technology, it is not the technology per se that is of interest, so much as the changes that the technologies instigated and the challenges and opportunities that this created. Thus, with the phonogram it was the ability for live performances to be recorded and fixed and then reproduced automatically at another time and place that

1. Irwin Karp, 'Interests of Authors and Users' in Lowell Hatterly and George Bush (eds), © *Reprography and Copyright Law* (Port City Press Inc, Baltimore, Md USA, 1964), 143.

was at issue. Likewise with the tape recorder, it was the ability for people to record music at home that was the problem.²

While there have been a number of important studies that have examined the impact of specific technologies, notably the printing press,³ on the development of copyright law, there are many other technologies that have not been given the attention they deserve.⁴ This is particularly the case with twentieth century technologies.⁵ In part, the aim of this book is to overcome this oversight.

By looking at the way that copyright law interacted with old technologies when they were new, we are able to get a better understanding of various aspects of copyright law. For example in her chapter, *The World Daguerreotyped: 'What a Spectacle!': Copyright law, photography and the economic mission of Empire*, Kathy Bowrey looks at the way that photographs came to be protected as artistic works in the United Kingdom and in colonial Australia. To date most of the literature that has looked at copyright and photography has concentrated on how the artistic reception of photography affected its passage into the category of artistic works and on the relationship between copyright law, the requirement of originality and photographs. While Bowrey builds upon this literature, she takes it in an interesting new direction insofar as she highlights the important role that the content of what was photographed played in the acceptance of photographs as copyright subject matter.

In *The Electric Telegraph and the Struggle over Copyright in News in Australia, Great Britain and India*, Lionel Bently examines the spread of the electric telegraph in the late nineteenth and early twentieth centuries in Australia, the United Kingdom and British India. As Bently shows, the telegraph changed the way that information in general, and news in particular, was distributed. Over time this gave rise to a number of questions: was copyright available to protect newspaper proprietors and, if so, could it protect the news itself from appropriation? If news could be protected, how could such laws be made workable? As Bently explains, the question of news copyright arose in Australia, the United Kingdom and British India at different times and with different results. While some Australian States introduced legislation that protected news sent by submarine telegraph, in the United Kingdom proposals for copyright were rejected as unworkable. While the Government in India came close to adopting copyright legislation, the Viceroy intervened and the proposed legislation was dropped.

Bently's chapter reminds us that insofar as technological change prompts calls for the protection of new (or old) cultural products, technology is deeply implicated in the definition of the subject matter of copyright (a subject matter that has constantly been renegotiated in response, in part, to technological change). Importantly, the different

-
2. The notable exception to this is, as Samuelson shows, the computer program.
 3. Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775)* (Oxford: Hart Publishing, 2004); Mark Rose, *Authors and Owners: the Invention of Copyright* (Harvard: Harvard University Press, 1995).
 4. There is, for example, little that has been written about tape-to-tape players, the VCR, phonograms, broadcasting and television.
 5. Despite the important role that technology has played and continues to play in the development of copyright law, it has largely gone unexplored as a topic in its own right. There are some notable exceptions including Paul Goldstein, *Copyright's Highway, From Gutenberg to the Celestial Jukebox* (Hill and Wang, New York, 1994).

reactions to the telegraph in Australia, the United Kingdom and British India also remind us that technological change does not map neatly onto legal change. Rather, the way that the law responds and reacts to new technologies is always mediated by the political, social, economic and cultural environment in which the interaction occurs.

In Johnson Okpaluba's contribution, *The Phonogram: A Tale of Vested Interests and Seized Opportunities*, we are treated to a detailed account of the phonogram and its effect on British copyright law. Okpaluba argues that when British law first encountered the phonogram, copyright law was still largely written for and conceived with printed works in mind. It was also primarily concerned with controlling the unauthorized printing or reprinting of books. One of the consequences of this was that the copyright paradigm was ill-suited to deal with phonograms, piano rolls and the mechanical reproduction of music. However, in the early part of the twentieth century, copyright law changed into a law that prohibited reproduction of works in any material form. In explaining how this transformation came about, Okpaluba shows how concerted lobbying by the various interested parties in the late nineteenth and early twentieth century was fundamental to the development of copyright law in relation to music.

In *Radio: Early Battles over the Public Performance Right*, Graeme Austin explores the way that copyright law interacted with radio in the United States in the early to mid-part of the twentieth century. From this rich history, Austin highlights the fact that the problem created by radio was not the lack of clarity in the judicial response to broadcasting; rather it was that the early radio industry did not like the answers it received. Austin shows that while copyright owners were initially content for musical works to be played on radio on the basis that they served to advertise the phonorecords, they eventually decided that they wanted to be paid for this use. Austin outlines the long process following this where copyright owners sought to gain control over the public performance of their musical works. Specifically, he shows how case law eventually recognized that the radio broadcasting of copyright works involved a 'public' performance that needed to be licensed. He also shows how case law established the basis for the system of blanket licensing that continues to operate today.

In *How Did Film Become Property? Copyright and the Early American Film Industry*, Oren Bracha explores the emergence of copyright in film in the United States in and around the turn of the twentieth century. One of the notable features of this history is, as Bracha shows, the relatively smooth path that film copyright had, particularly when compared to the problems that had confronted photography. Bracha argues that the ease and speed by which film was initially recognized as copyright subject matter was the result of a range of factors from ideological and public choice considerations through to various contingent path factors including the pre-existing practice of photography and the experience and familiarity that many of the early central figures in the motion pictures industry had with intellectual property law. As well as looking at the factors that facilitated the acceptance of film copyright as a distinct form of copyright, Bracha also looks at the contours of the new form of copyright, particularly in relation to the scope of motion picture copyright, and the

extent to which copyright in other expressive material extended to their use in motion pictures.

In looking at the relationship of copyright law and film, Bracha argues that the history of film copyright should not be seen as a linear progression from technology to market value (through interest group politics) to property rights. Instead, Bracha shows how the history of film copyright reveals itself as ‘a web of causation in which technology, the market, interest group politics and ideology are intermingled in reciprocal relations of causation’. He also argues that a history of motion picture copyright should not be seen as the ‘extension of copyright—a legal and intellectual concept with a pre-existing stable content—to cover a new field or media’. This is because rather than simply applying pre-existing concepts and doctrines of copyright to a new media, the application of copyright to motion pictures helped to reshape those doctrines and concepts: ultimately it redefined copyright. Specifically, Bracha argues that film copyright helped to ensure that copyright came to be seen as a general field premised on the principle of protecting creative mental labour, rather than as something associated with the printing press.

In *The Story of the Tape Recorder and the History of Copyright Levies*, Bernt Hugenholtz looks at the way that German law responded to the phenomenon of ‘home copying’ facilitated by the tape recorder. In so doing he shows how with the proliferation of tape recorders, copyright – a vehicle originally designed to regulate and control commercial and institutional users – suddenly came to confront the rights and expectations of consumers and citizens. In examining how German legal doctrine, case law and legislation responded to this problem, Hugenholtz provides a history of the copyright levies introduced in the post-war period: the statutory scheme of remuneration in respect of recording equipment (later tape media) which eventually became a model for the world, initially for tape recording, later for video taping, and eventually for a range of recording and reproduction apparatus and ‘blank’ media. As Hugenholtz argues, there is a direct line to be drawn from the development of magnetic tape recording in Germany in the late 1930s, the introduction on the German consumer market in the early post-war years and the introduction of copyright levies in the post-war period.

In *Making Copies: Photocopying and Copyright*, Leanne Wiseman explores the relationship of copyright and the photocopier in United Kingdom and Australia. As Wiseman shows, copyright law’s interaction with the photocopier occurred in two stages. Initial responses to the photocopier were positive: particularly in relation to the role that the new copying technologies were able to play in improving access to scientific and technical information. Here the primary legal question was what could be done to ensure that copyright law did not hinder or limit this new found potential: the result being the introduction of specific defences to allow library copying and clarification that the fair defence applied to machine based copying. As the rapid increase in the amount of copying facilitated by photocopying, particularly of books and journal articles, began to threaten the economic interests of copyright owners, the focus of attention shifted from access issues towards the question of how owners should be compensated for the increased copying: the result, in Australia at least, was a mixture of strategic litigation that ensured that the parties who supplied the photocopiers took

responsibility for the people that used the machines and State sanctioned collective licences. Insofar as photocopying led to the introduction of the library copying defences, clarified the role of the fair dealing defence in relation to machine-based copying, and reinforced the pivotal role of collective administration to deal with the problem of decentralized copying, Wiseman shows the profound impact that the photocopier had on copyright law across the twentieth century.

In *Public Ownership of Private Spectacles: Copyright and Television*, Brad Sherman looks at the process that led to the establishment of broadcast copyright in the United Kingdom in 1956. While it is often said that broadcast copyright was introduced in order to protect the investment made in television broadcasts, Sherman shows that the new form of copyright was introduced to resolve the deadlock that had prevented sporting events from being televised. Echoing the theme highlighted by Bowrey, Sherman shows how the content of what was broadcast – here sporting events of all kinds – played a pivotal role in the formation of copyright in television broadcasts. While broadcast copyright was developed as a way of resolving the deadlock that had prevented sport from being televised, by the time a legislative solution had been found, however, sport – along with content more generally – had disappeared from the picture. Instead of only granting rights to sporting promoters, the legal rights that were designed to allow more sport to be televised were recast in a non-discriminatory way so that they applied to *all* broadcasts. In so doing, the focus of attention shifted from the content of what was communicated to the mechanism that allowed content to be communicated to the public. Sherman concludes by looking at the ramifications this has for the way that we think about broadcast copyright more generally.

In the final chapter in the book, *A Square Peg in a Round Hole? Copyright Protection for Computer Programs*, Pamela Samuelson looks at the unlikely history that saw computer programs come to be accepted as literary works in United States copyright law in the late 1970s and early 1980s. In so doing, we are treated to a fascinating story about the relationship between copyright and technology that is at odds with many of the other contributions to this collection. This is because rather than looking at the problems created by a technology – such as home taping or office copying – the problem created by computer programs was that copyright law was suddenly confronted with the prospect of protecting technology itself. Drawing on this theme, Samuelson shows why the economic and legal arguments for extending copyright protection to computer programs in the 1960s were initially perceived to be weak because copyright had never before protected such a deeply functional type of intellectual creation. After looking at how these problems were overcome, Samuelson shows how software came to be seen as appropriate subject matter for copyright protection. In the final part of the chapter, Samuelson returns to look at the technological nature of computer programs. Specifically, she outlines the gradual process that occurred in the late 1980s and early 1990s, where courts and commentators grew increasingly dissatisfied with the literary work metaphor because it obscured recognition of the technical (functional) nature of programs.

In their own way, each of the chapters offer an important insight into the way that copyright law interacted with a number of different technologies. While an historical examination of the way that the copyright law interacted with different technologies is