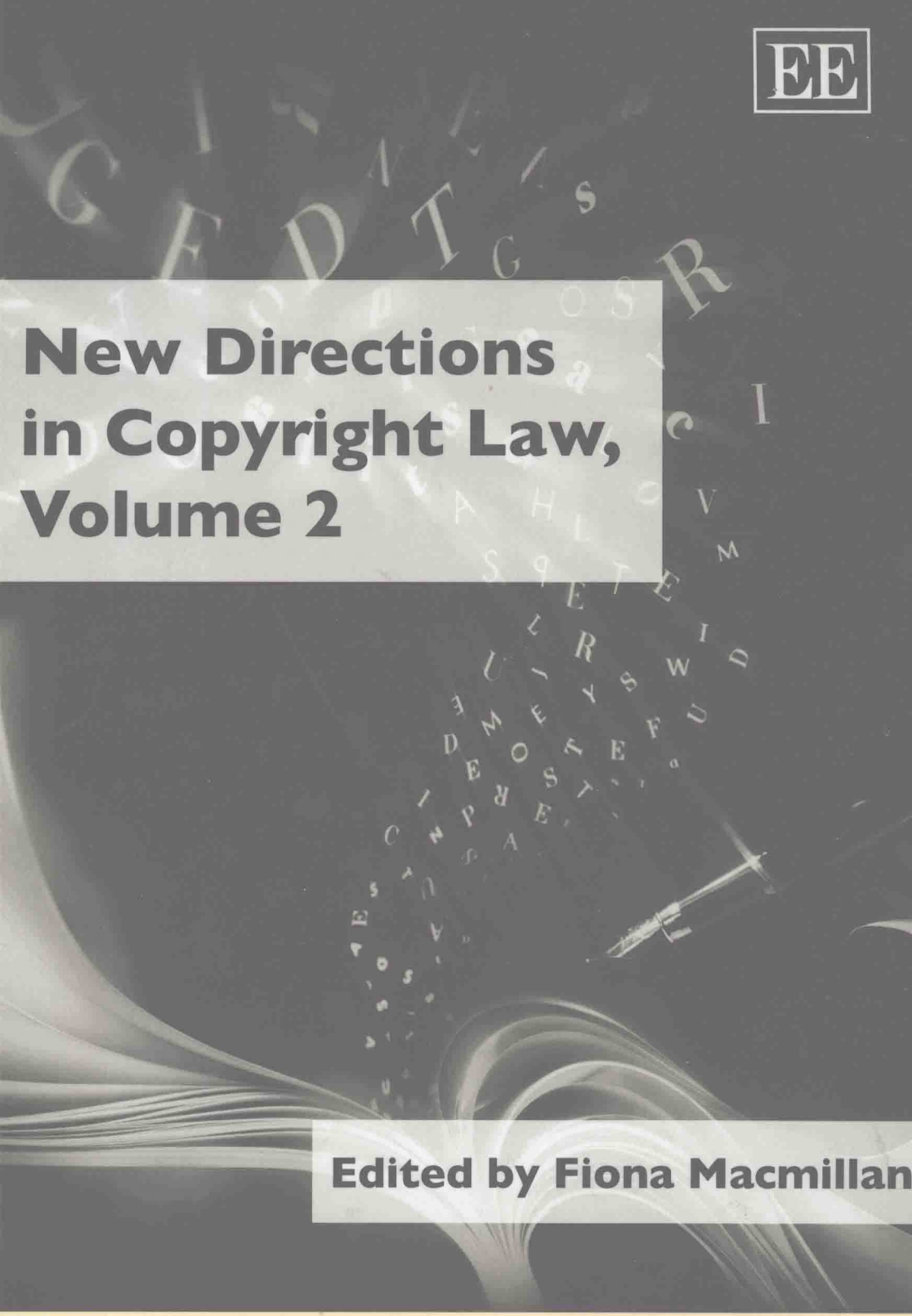

New Directions in Copyright Law, Volume 2

Edited by Fiona Macmillan

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Preface

Fiona Macmillan

> Fortunately, scholarly and political conferences have nothing in common. The success of a political convention depends on the general agreement of the majority or totality of its participants. The use of votes and vetoes, however, is alien to scholarly discussion where disagreement generally proves to be more productive than agreement. Disagreement discloses antinomies and tensions within the field discussed and calls for novel exploration. Not political conferences but rather exploratory activities in Antarctica present an analogy to scholarly meetings: international experts in various disciplines attempt to map an unknown region and find out where the greatest obstacles for the explorer are, the insurmountable peaks and precipices.[1]

These words constituted part of the closing remarks of Roman Jakobsen at a Conference on Style held at Indiana University in 1958. They embody an image of a successful academic conference that persists despite the passage of time and differences in subject matter.

The chapters in this volume are based on papers delivered at the first AHRC Annual Conference on New Directions in Copyright Law. Their authors are international experts from a variety of disciplines employing a range of theoretical and methodological approaches to issues in copyright law. Given the search for new directions in this area, it is to be hoped that the differences in disciplinary expertise and approach appearing in this volume result in just the sorts of productive tensions to which Jakobsen refers. I am grateful to all of the authors for their stimulating, and often provocative, presentations and final chapters.

This volume and the series of which it is a part is structured around the six themes of the AHRC Network on New Directions in Copyright Law, which are: (1) Theoretical Framework of Copyright Law; (2) Globalisation, Convergence and Divergence; (3) Developments in Rights Neighbouring on Copyright; (4) Protection of Traditional Knowledge and Culture; (5) Copyright and the New Technologies; and (6) Copyright, Corporate Power

1 R. Jakobsen, 'Linguistics and Poetics', Conference on Style, Indiana University, 1958, reprinted in R. DeGeorge and F. DeGeorge, eds, *The Structuralists: From Marx to Lévi-Strauss* (New York: Anchor, 1972), 85.

and Human Rights. Further details on the Network, its themes and activities are available at http://www.copyright.bbk.ac.uk.

The conference, at which earlier versions of the chapters appearing in this volume were delivered as papers, employed the thematic structure of the Network. The conference panels were organised and chaired by core participants in the Network. For their insight and elegance in carrying out these tasks, I am grateful to Dr Kathy Bowrey, University of New South Wales (Theoretical Framework of Copyright Law), Dr Birgitte Andersen, Birkbeck (Globalisation, Convergence and Divergence), Professor Lionel Bently, University of Cambridge (Developments in Rights Neighbouring on Copyright), Professor Michael Blakeney, Queen Mary, University of London (Protection of Traditional Knowledge and Culture), Professor Martha Woodmansee, Case Western Reserve University (Copyright and the New Technologies), and Dr Uma Suthersanen, Queen Mary (Copyright, Corporate Power and Human Rights).

As its name suggests, the Network is funded by the Arts and Humanities Research Council. It is also generously supported, both intellectually and physically, by the School of Law at Birkbeck. Particular thanks in this respect are due to my Head of School, Professor Leslie Moran.

Most importantly, and as always, I owe a major debt of gratitude to the Network Administrator, Valerie Kelley. Not only has she organised all the Network events with great efficiency and charm, her work on this volume has been indispensable.

Fiona Macmillan
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August 2005

Contents

PART ONE

THEORETICAL FRAMEWORK OF COPYRIGHT LAW

1. The Productive Potential of Intellectual Property Rights: Governance and Value Creation Processes

Birgitte Andersen and Sue Konzelmann

The exploitation of intellectual property (IP)[1] is legally protected through the use of intellectual property rights (IPRs), which take the form of copyright, trademarks and design rights, patents and trade secrets. Because of the growing importance of knowledge-based assets in recent years, and because the control over the use of an IPR requires ownership or a licence, IPRs have become a strategic asset for those who own and control them. Thus, there has been acceleration in the pace at which individuals, firms and the public sector are using IPRs to privatise knowledge-based assets.[2]

In industry, government and international agencies, the view that innovation, competitive advantage, knowledge transfer growth and welfare derive from the privatisation of the intellectual capital and knowledge-based assets of individuals and firms has led to increased enforcement of IPR regimes worldwide.[3] As a result, IPR policy has been founded on this dominant view held by policy makers rather than on the findings of solid empirical research. Within the IPR research community, the social and

1 For an overview of forms of intellectual property (IP) including intangible assets and intellectual capital, see B. Andersen and L. Striukova, 'Intellectual Capital and Intangible Assets: Where Value Resides in the Modern Enterprise', *School of Management and Organizational Psychology Working Paper Series* (02/2004). Such forms of IP are important, as they are able to produce operational and dynamic efficiencies as well as competitive advantages.

2 For an account on the historical growth in patenting practice, see B. Andersen, *Technological Change and the Evolution of Corporate Innovation: The Structure of Patenting 1890–1990* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 2001).

3 B. Andersen, 'If "Intellectual Property Rights" is the Answer, What is the Question? Revisiting the Patent Controversies', *Economics of Innovation and New Technology* 13/5 (2004), 417–42.

economic effects of tightening the IPR system are not considered obvious.[4] At the same time, small and medium sized enterprises and many less developed countries have expressed growing concern about the emergence of a new form of competition in which the IPR regime sets the 'rules of the game'.

Part of the problem is that the existing social contract and political expediency literature examining the objectives, operation and performance of IPR systems bases its analysis on the theoretical logic of mainstream law and economic theory. This analysis assumes that all inventors are autonomous, rational, profit-maximising agents whose collective behaviour maximises both their own and the general society's welfare. The very real effects of technological inter-dependence, strategic interaction and collaboration in competitive IPR markets are largely ignored. This is problematic because, for example, the specific and rigid nature of productive knowledge applied in technological ideas can affect the efficiency of patent systems. The effectiveness of copyright systems can also be influenced by predominant norms, values and beliefs embedded in cultural expressions. Power-relationships in IPR-related bargaining situations can have important impacts on behaviour and outcomes; and there are substantial opportunity costs associated with using the IPR system as a political instrument. Finally, whereas the current law and economics approach to IPRs equates competition with perfect competition and monopoly with pure monopoly, the actual architecture of the IPR system is a hybrid structure with both competitive and monopolistic dimensions.[5] This chapter argues that these 'real life' forces should be considered when IPR policy is designed and implemented because the interaction of micro-level units within IPR systems does not necessarily maximise social and economic welfare at the macro level; and IPR regimes (at the macro level) do not guarantee welfare for each (micro-level) participant within the IPR system.

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4 Current controversies regarding the patent system include issues related to: the Trade Related Aspects of the Intellectual Property Section (TRIPs) of the World Trade Organization (WTO); the integration of new areas of protection into the patent system that grant protection beyond science-based principles; software patents; exclusive rights on pure ideas, such as genetic codes and mathematics; lengthening the period of protection; the 'submarine' patenting-scheme in the US; the Bayh–Dole Act in the US in 1980, which created incentives for universities to patent basic research and is now encouraged world-wide; the patenting of traditional knowledge; the problem of biopiracy; and access to patented medicine. Current controversies regarding the copyright system include issues related to: problems of fair recognition; cultural expansion; database protection; the use of copyright in the media, such as sport and 'pay per view' TV; and the copyrighting of traditional cultural expressions. Current controversies regarding the trademark system include issues related to whether brands are for consumer exploitation or consumer protection.

5 For a critical overview, see supra n. 3.

This chapter develops an *alternative analytical framework*, based on realistic assumptions about the objectives, operation and performance of alternative forms of IPR governance at various levels of aggregation. In developing this framework, three streams of literature from economics (productive systems), corporate governance and IPRs (patents and copyrights) are merged. The central assumption is based on a productive systems[6] perspective, which explains the requirements for operational and dynamic efficiencies and, hence, system performance, in terms of the ability to secure effective cooperation among all the players within the system. With a focus on patents and copyrights, the objective is to understand better the productive potential of alternative forms of IPR governance and their influence on the quality of relationships among stakeholders within the IPR system. In this context, an understanding of the location of the (financial and non-financial) value derived from IPRs, and the interrelated processes of value creation, realisation and distribution is of central importance. In our view, better understanding of these processes will improve the design of IPR management and policy and, hence, the effectiveness of IPR systems in general.

This chapter is constructed as follows: Section 1 lays out the analytical framework for understanding the interrelated processes and dynamics by which IPR governance achieves productive efficiency and performance effectiveness. Section 2 identifies the sources of value from IPRs and locates them with respect to two dimensions: embeddedness in individual entities (such as firms) or in systems and structures (such as strategic networks); and provision of market or non-market advantages. Section 3 analyses alternative IPR governance structures at the macro, micro and meso levels. In this section, we examine the processes by which value from IPRs is generated and appropriated. The stakeholders in alternative governance structures are identified, as are their mutual and conflicting interests with respect to the productive potential of IPRs and the conflicts that might occur when jointly created value is distributed among stakeholder groups. This highlights the importance of finding mechanisms for effectively resolving conflicts of interest in order to secure effective system performance. Section 4 analyses the dynamics by which IPR productive system effectiveness might be achieved in the various systems of IPR governance. Section 5 draws conclusions from the previous analysis, identifies the contribution of the

6 See, for example, F. Wilkinson, 'Productive Systems', *Cambridge Journal of Economics*, 7 (1983), 413–29; F. Wilkinson, 'Productive Systems and the Structuring Role of Economic and Social Theories', in J. Michie, ed., *Systems of Production: Markets, Organisations and Performance* (London: Routledge, 2002); and A. Birecree, S. Konzelmann and F. Wilkinson, 'Productive Systems, Competitive Pressures, Strategic Choices and Work Organisation: An Introduction', *International Contributions to Labour Studies* 7 (1997), 3–17.

framework developed in this chapter for IPR management and policy, and proposes avenues for further research.

1. IPR PRODUCTIVE SYSTEMS

In this section, we lay out the analytical framework for understanding the interrelated processes and dynamics by which IPR *productive systems* achieve efficiency by contributing to the best use of resources and performance effectiveness in terms of reaching IPR-related individual, corporate and society goals.

'Productive systems' are those systems where the *forces* of production combine in the *process* of production and can be applied to any association in which individuals or groups come together for the purpose of jointly creating something and distributing the surplus value among themselves.[7] In an IPR productive system, individuals and firms come together with the objective of exchanging rights to own or control IPRs. The system's effectiveness is determined by the willingness of participants to perform satisfactorily their productive role; and it is in both the individual and collective interest to cooperate fully. This is because of the mutual dependence inherent in IPR system relationships and the operational and dynamic efficiencies that are generated by cooperation. Cooperation not only 'facilitates the sharing of knowledge . . . [it] also fuels the learning processes by which new information and knowledge are created, incorporated and diffused, and by which new products, processes and organisational forms are developed'.[8] Cooperation is therefore centrally important for effective system performance; and it generates efficiencies that determine the value created by the system, which is then available for distribution among the various stakeholder groups. However, the centrality of cooperation in securing effective IPR system performance does not imply that all interests are shared because individuals and groups may see different value in IPRs; they also compete over shares of the value they jointly produce. Because of the potential for distributional conflicts to undermine cooperation, mechanisms for resolving conflicts are important for the system's long-term performance viability. Such mechanisms can be legal, but they can also be informal and integrated in the daily routines of cooperation.

Within IPR productive systems, relations have both technical and social dimensions. The *technical relations of value creation* are the functional inter-linkages between the various agents within the system. They encompass

7 Ibid.
8 Wilkinson, supra n. 6, at 2.

the technical elements of contractual relationships between the buyer and seller of an IPR, the licensor and licensee of an IPR, or the participants of a patent pool, or other such arrangements. They are objective and impersonal associations, shaped by the technicalities of the system. By contrast, the *social relations of value creation* are the subjective and personal associations among the human agents within the system. They form the social structure within which the objectives of the system are jointly pursued. By directing, co-ordinating and controlling the relations among the system's participants, the social relations of value creation play a central role in determining the effectiveness of co-operation and hence the operational and dynamic efficiency of the system as a whole. Within IPR systems this could include business practices and routines, such as routines for setting standards in technological development, for making IPR contracts, for solving conflicts, for making IPR applications, and for negotiating IPR-related agreements (including routines for setting price or for joint research and development, R&D). In short, the social relations of value creation are important for getting things done efficiently and effectively.

The social relations are therefore centrally important in the effectiveness of the productive system. They have the dual role of securing co-operation in meeting the objectives of the system and agreement over distribution of the outcome from those relations. This is important for performance and efficiency because failure to secure agreement over distribution has the potential to set off a retaliatory withdrawal of co-operation, which serves to reduce both efficiency and the ability to perform effectively over the long term. There are potential conflicts between individual interests in relative shares and the longer-term collective interest in the 'size of the pie'. However, system effectiveness has the potential for setting off a virtuous cycle, as it can be seen to generate additional resources for distribution that increase the prospects for increased co-operation and operational and dynamic efficiencies over the longer term. System decline risks the opposite, setting off a degenerative cycle of conflict over distribution, withdrawal from co-operation in production and deteriorating economic performance.

There may also be other areas where the individual objectives of participant firms or individuals come into conflict with the interests of the IPR system as a whole. For example, the aim of a participant firm in the IPR system is to secure access to knowledge from the IPR system at a minimum cost; and then to make efficient use of that knowledge such that it generates maximum value for the firm itself. This value then forms the basis for what can be distributed among the firm's stakeholders, importantly influencing the willingness to continue to participate fully in respective productive roles. In these cases, the effectiveness of the IPR system will importantly depend on the resolution of these conflicts to the mutual satisfaction of the stakeholders