

Andreas Rahmatian



# **COPYRIGHT AND CREATIVITY**

The Making of Property Rights in Creative Works



# Copyright and Creativity

The Making of Property Rights in Creative Works

---

Andreas Rahmatian

*University of Glasgow, UK*



**Edward Elgar**

Cheltenham, UK • Northampton, MA, USA

© Andreas Rahmatian 2011

The author has asserted his right to be identified as the author in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

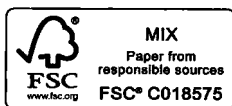
All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by  
Edward Elgar Publishing Limited  
The Lypiatts  
15 Lansdown Road  
Cheltenham  
Glos GL50 2JA  
UK

Edward Elgar Publishing, Inc.  
William Pratt House  
9 Dewey Court  
Northampton  
Massachusetts 01060  
USA

A catalogue record for this book  
is available from the British Library

Library of Congress Control Number: 2011924160



ISBN 978 1 84844 246 7

Typeset by Columns Design XML Ltd, Reading  
Printed and bound by MPG Books Group, UK

## Preface

---

The importance of copyright in law and modern society cannot be over-emphasised today. But it is not only the growing share of the 'creative industries' in the economy which indicates that importance. Copyright also provides an increasingly relevant and powerful legal device for the total commercialisation of humans and things that engulfs every aspect of human life in accordance with the prevalent ideology of the globalised market. The creed of the all-encompassing market resorts more and more to copyright to achieve its objectives, and copyright in its versatility serves these objectives exceptionally well.

This book discusses the making of property out of creative works through the legal mechanism of copyright. It shows the manner in which the law translates a great variety of expressions of the human mind into its normative system and transforms them into the property right of copyright, or, on the European continent, *droit d'auteur*. It deals with the role of philosophical and economic justifications for the legal artifices of property and copyright-property as critically informed confirmation of the present state of affairs, and it looks at the relationship of copyright to the 'public domain'. The discussion will then focus on the legal powers and inherent limitations of the property right of copyright. The book will also examine the popular 'death of the author' ideology that is based on a questionable interpretation of intellectual history, and it will show that the true effect of this school of thought is to liquidate the individual human author in favour of an ostensible concern for collaborative and anonymous authorship, but in fact for the benefit of the (usually corporate) copyright owner. This liquidation carries on: the final parts of the book will discuss the alienation or transfer of copyright-property and the alienation of the author from his/her work, as well as the commodification of human authors themselves as objects of property through their works. At an international level, this legal, commercial and managerial construct becomes a basis for neo-feudal and neo-colonial developments. Copyright is as good or as bad as the human actors who make and use it.

The structure of the book can be compared to a wheel: the axle bearings are Chapter 1 (concepts of dematerialised property and copyright-property)<sup>1</sup> and Chapter 2 (justification of copyright-property and concept of the public domain), and Chapters 3–6 are the spokes of the wheel (Chapter 3: limitations to the powers of copyright ownership; Chapter 4: authorship, creativity and ownership; Chapter 5: alienation; Chapter 6: neo-feudal and neo-colonial features of international copyright protection). Thus Chapters 3–6, while fairly independent from one another, are all based on the concepts and terminology of Chapters 1 and 2. References throughout the text guide the reader to connect the necessary passages.

The book is a contribution to contemporary debates in copyright law, but it does not aim to be a comprehensive work on copyright. The discussion confines itself to areas where I thought I could make an original contribution, and I saw no need to give an exposition of the law beyond what is necessary for the arguments developed here; fortunately there are a number of good copyright textbooks in the UK which provide a more comprehensive survey of the black-letter law if required. So there is a lot of discussion on the subsistence of copyright and its proprietary nature, but little on infringement; the special problems copyright faces in relation to digital rights management, computer programs and the internet are mentioned in passing only, and issues of competition law have not been dealt with in the context of copyright licences. These matters would be appropriate for separate studies. In the passages on comparative copyright law there is more emphasis on UK law and the author's rights systems (predominantly France and Germany) rather than on US copyright law, since this jurisdiction is most broadly covered in the existing literature. It may be surprising that seemingly familiar themes of copyright theory have been discussed at great length, especially Hegel's *Philosophy of Right* and Marx's alienation theory, but during my research I realised with great astonishment how little these authors are properly understood in the Anglo-Saxon world, despite the fact that they are frequently referred to. The problem starts with unsatisfactory translations from the German in which, for example, the philosophically different terms *Entäußerung*, *Veräußerung* and *Entfremdung* are rendered indistinguishably as 'alienation', so I worked entirely from the original German texts. The reader of an English translation will probably find it hard to believe that the earlier Marx is remarkably clear and fairly easy to read in the original. It might be that in the context of

---

<sup>1</sup> Parts of Chapter 1 have also appeared as a book chapter (dealing with copyright, patents and trade marks) 'Intellectual Property and the Concept of Dematerialised Property' in S. Bright (ed.), *Modern Studies in Property Law*, Vol. 6 (Hart Publishing, 2011), pp. 361–383.

copyright law Hegel and Marx have been discussed in English adequately for the first time in this book.

Some statements in the book may be perceived as polemical, but in my experience a position that conforms to the mainstream of scholarly teaching of any particular era is often quickly labelled as scientific, while heterodox views tend to be dismissed as polemical. I do not shy away either from occasional moral judgements in relation to some untenable conditions. One should not stretch academic disinterestedness towards opportunism; academics should rather try to regain the position of intellectuals with an opinion in the public debate.

A lot of academic literature has been published in relation to some of the discussed areas, and not all could be referred to. This is to avoid duplications; occasionally material is regrettably merely obscure academic prose that benefits most from not being cited; and some work would have deserved a separate and more extensive critical discussion which would have gone beyond the space available.

This book started its life in Leicester, a town where the word ‘province’ obtains its meaning to the full, and was completed in Glasgow, an intellectually and aesthetically infinitely more inspiring place. My academic institutions assisted my book project in that they did not extend my existing teaching and administrative duties during my time of writing; nevertheless the completion got delayed significantly. I would like to thank my publishers for their sustained patience. I would also like to thank colleagues and friends for ideas and inspiration. But assertion of authorship also means responsibility, so any errors are obviously mine.

More than 300 years ago the Statute of Anne stated in its preamble that it was ‘for the Encouragement of Learned Men to Compose and Write useful Books’. It is for the readers to decide whether this book is useful. Copyright did not encourage me to compose and write the book, but these days it is already a success if copyright does at least not discourage from creating. If this book can assist in the cutting back of copyright protection to reasonable dimensions, it will have achieved a lot.

Andreas Rahmatian  
Glasgow, March 2011

# Table of legislation

---

## INTERNATIONAL TREATIES

Berne Convention for the  
Protection of Literary and  
Artistic Works 1886 (Paris text  
1971, amended 1979)  
Art. 2 **54**  
Art. 3 **46**  
Art. 5 **46, 248**  
Art. 6*bis* **50**  
Art. 7 **46**  
Art. 9 **138**  
Art. 11*bis* **202**  
Art. 14*bis* **202**  
Paris Convention for the Protection  
of Industrial Property 1883  
(Stockholm text 1967, amended  
1979)  
Art. 2 **248**  
TRIPS Agreement (Agreement on  
Trade-related Aspects of  
Intellectual Property Rights  
1994, Annex 1C of the  
Marrakesh Agreement  
Establishing the World Trade  
Organization)  
Art. 3 **248**  
Art. 9 **126, 248**  
Art. 10 **136**  
Art. 13 **138**  
Art. 18 **270**  
Art. 15 **248**  
Art. 27 **248**  
International Convention for the  
Protection of Performers,

Producers of Phonograms and  
Broadcasting Organisations 1961  
(Rome Convention) **59**  
WIPO Copyright Treaty 1996 **249**  
WIPO Performances and  
Phonograms Treaty 1996 **249**  
European Patent Convention  
(EPC) 1973 (revised 2000)  
Art. 84 **18**  
European Convention on Human  
Rights 1950, First Protocol  
Art. 1 **144**  
Universal Declaration of Human  
Rights of 10 December 1948  
Art. 26 **143**  
Art. 27 **143**  
International Covenant on  
Economic, Social and Cultural  
Rights (ICESCR) 1966  
Art. 15 **143**  
UN-Agreement governing the  
Activities of States on the Moon  
and other Celestial Bodies 1979  
Art. 11 **61**

## EU LEGISLATION

EC Database Directive 96/9/EC  
Art. 3 **101**  
EU Information Society Directive  
2001/29/EC  
Recital 30 **202**  
Art. 5 **138, 141**  
Art. 6 **101**  
Art. 9 **202**

- |   |  |                 |
|---|--|-----------------|
| EU Resale Right Directive   | § 24   | <b>116, 206</b> |
| 2001/84/EC  | § 26   | <b>206, 207</b> |
| Recital 2   | § 27   | <b>66, 116</b>  |
| Recital 18  | § 31   | <b>207</b>      |
| Recital 19  | § 41   | <b>141</b>      |
| Art. 1  | § 60   | <b>49</b>       |
| Art. 8  | § 87   | <b>25</b>       |
| EU Directive on Rental Right and Lending Right 2006/115/EC (codifying 92/100/EEC) | <i>Gesetz zum Schutze des literarischen und artistischen Eigentums</i> , 19 Oct. 1846 (Austrian Author's Rights Act of 1846) |                 |
| Art. 3  | § 11   | <b>18</b>       |
| EU Term Directive 2006/116/EC (codifying 93/98/EEC)                               | ABGB ( <i>Allgemeines Bürgerliches Gesetzbuch</i> , Austrian General Civil Code)   |                 |
| Art. 1  | § 285  | <b>67</b>       |
| Art. 3  | § 354  | <b>7</b>        |
| Art. 4  | § 1040   | <b>117</b>      |
| EU Software Directive 2009/24/EC (codifying 91/250/EEC)                           | § 1395   | <b>63</b>       |
| Recital 11  |  |                 |
| Art. 1  | <b>58, 126, 136, 137</b>   |                 |
| Art. 2  | <b>176, 212</b>  |                 |
| <b>NATIONAL LEGISLATION</b>   |  |                 |
| <b>Australia</b>  |  |                 |
| Copyright Act 1968  |  |                 |
| s. 35   | <b>209</b>   |                 |
| s. 84   | <b>173</b>   |                 |
| s. 97   | <b>173</b>   |                 |
| s. 99   | <b>173</b>   |                 |
| Copyright Amendment (Moral Rights) Act 2000                                       | <b>47</b>  |                 |
| <b>Austria</b>  |  |                 |
| UrhG 1936 ( <i>Urheberrechtsgesetz 1936</i> , Austrian Author's Rights Act 1936)  |  |                 |
| § 1   | <b>54</b>  |                 |
| § 21  | <b>240</b>   |                 |
| § 22  | <b>241</b>   |                 |
| § 23  | <b>49, 205, 265</b>  |                 |
|   | Art. L111–1 <b>49, 51, 52, 65, 176, 212</b>  |                 |
|   | Art. L111–3 <b>241</b>   |                 |
|   | Art. L112–2 <b>52, 53</b>  |                 |
|   | Art. L112–3 <b>54</b>  |                 |
|   | Art. L113–2 <b>49</b>  |                 |
|   | Art. L113–9 <b>176, 212</b>  |                 |
|   | Art. L121–1 <b>51, 52</b>  |                 |
|   | Art. L121–2 <b>51</b>  |                 |
|   | Art. L121–4 <b>51, 56, 241</b>   |                 |
|   | Art. L121–5 <b>240</b>   |                 |
|   | Art. L121–8 <b>51</b>  |                 |
|   | Art. L122–1 <b>52</b>  |                 |
|   | Art. L122–2 <b>205</b>   |                 |
|   | Art. L122–5 <b>141</b>   |                 |
|   | Art. L122–6 <b>141</b>   |                 |
|   | Art. L122–7 <b>51, 205</b>   |                 |
|   | Art. L131–2 <b>205</b>   |                 |



- Art. L131–3 **205, 240**  
 Art. L131–7 **205**  
 Art. L132–23 **176**  
 Art. L132–24 **176**  
 Art. L215 **59**  
 Art. L331 **24**  
 Code Civil  
   Art. 544 **7, 67**
- Germany**
- UrhG 1965 (*Urheberrechtsgesetz*  
   1965, German Author's Rights  
   Act 1965)  
   § 1 **176**  
   § 2 **52–53, 58, 59**  
   § 3 **54**  
   § 4 **54**  
   § 6 **50**  
   § 7 **49, 176, 212**  
   § 11 **49, 52, 176, 212, 251**  
   § 12 **50**  
   § 13 **50**  
   § 14 **50**  
   § 24 **141**  
   § 28 **52, 142**  
   § 29 **49, 52, 176, 213, 214, 239**  
   § 31 **52, 206–207**  
   § 31a **207**  
   § 34 **66, 116, 207, 265**  
   § 40 **207**  
   § 42 **50, 56, 241**  
   § 43 **212**  
   § 44 **203**  
   § 44a **141**  
   § 60 **50**  
   § 64 **49**  
   § 69a **58**  
   § 69b **176, 213**  
   § 72 **59**  
   § 94 **59**  
   § 97 **24**
- BGB (*Bürgerliches Gesetzbuch*,  
   German Civil Code)  
   § 90 **67**  
   § 409 **63**  
   § 687 **117**  
   § 903 **7**  
   § 931 **24**  
 UWG 2010 (*Gesetz gegen den*  
   *unlauteren Wettbewerb 2010*  
   *[Neufassung]*, German Law  
   against Unfair Competition  
   2010)  
   § 3 **55**  
   § 4 **55**  
 Grundgesetz 1949 (Basic Law)  
   Art. 1 **49, 253**  
   Art. 2 **49**  
   Art. 14 **67, 123**
- Israel**
- Israeli Copyright Act 2007  
   s. 45 **211**
- Italy**
- Italian Copyright Law  
   (Consolidation), 22 April 1941  
   (16 November 1994) (*Protezione*  
   *del diritto d'autore e di altri diritti*  
   *connessi al suo esercizio*)  
   Art. 65 **141**
- Netherlands**
- Netherlands Copyright Act 1912  
   (*Auteurswet 1912*)  
   Art. 6 **174**  
   Art. 7 **211**  
   Art. 8 **175**  
   Art. 15 **141**
- Spain**
- Spanish Law 22/1987 on  
   Intellectual Property (*Ley*

- 22/1987 *de Propiedad Intelectual*, 1987)  
 Art. 51 **212**
- Switzerland**
- URG 1992 (*Urheberrechtsgesetz* 1992, Swiss Author's Rights Act 1992)  
 Art. 9 **243**  
 Art. 11 **243**  
 Art. 16 **51**
- ZGB (*Zivilgesetzbuch*, Swiss Civil Code)  
 Art. 641 **7**
- United Kingdom**
- Copyright Act 1911  
 s. 21 **171**
- Copyright Act 1956  
 s. 3 **50**  
 s. 4 **12**  
 s. 6 **47**  
 s. 36 **12**  
 s. 43 **47**
- Copyright, Designs and Patents Act 1988 (CDPA 1988)  
 s. 1 **1, 12, 15, 19, 26, 28, 36**  
 s. 3 **14, 15, 16, 18, 36, 42, 101, 110, 132, 172, 189, 227**  
 s. 3A **37, 101**  
 s. 4 **14, 17, 36, 37, 188, 190**  
 s. 5A **14, 19, 36, 39, 42**  
 s. 5B **14, 36, 39**  
 s. 6 **14, 36, 39**  
 s. 8 **14, 36, 39**  
 s. 9 **43, 172, 173, 245**  
 s. 10 **196**  
 s. 11 **43, 171, 173, 209**  
 s. 12 **173**  
 s. 13A **146, 174**  
 s. 13B **174**  
 s. 14 **174**
- s. 15 **174**  
 s. 16 **15, 22, 23, 274**  
 s. 18 **50**  
 s. 22 **141**  
 s. 29 **139**  
 s. 30 **30**  
 s. 32 **142**  
 s. 56 **203**  
 s. 77 **238**  
 s. 78 **238**  
 s. 79 **211, 237, 239**  
 s. 80 **238**  
 s. 81 **237**  
 s. 82 **211, 239**  
 s. 87 **47, 238**  
 s. 90 **1, 25, 204, 214, 245**  
 s. 91 **206, 214**  
 s. 92 **25, 206**  
 s. 93 **203**  
 s. 94 **47, 239**  
 s. 96 **1, 8, 47, 238**  
 s. 101 **206**  
 s. 103 **47, 238**  
 s. 153 **46**  
 s. 178 **173**  
 s. 180 **192**  
 s. 192A **230**  
 s. 213 **17, 26**  
 s. 263 **208**
- Registered Designs Act 1949 (RDA 1949)  
 s. 1 **17, 26**
- Patents Act 1977 (PA 1977)  
 s. 1 **21, 22**  
 s. 2 **112**  
 s. 14 **18**  
 s. 30 **26**  
 s. 60 **22**
- Trade Marks Act 1994 (TMA 1994)  
 s. 2 **26**  
 s. 3 **125**  
 s. 5 **125**

Bills of Exchange Act 1882  
s. 29 **10**

### **England and Wales**

Law of Property Act 1925

s. 1 **145**

s. 53(1)(c) **11, 204**

s. 205 **145**

Contracts (Rights of Third Parties)  
Act 1999 **115**

### **Scotland**

Tenements (Scotland) Act 2004 **7, 123**

Leases Act 1449 **145**

Land Registration (Scotland) Act  
1979 **145**

Abolition of Feudal Tenure etc.  
(Scotland) Act 2000

s. 2 **259**

s. 58 **260**

### **United States**

Copyright Act 1976, 17 U.S.C.

§ 101 **42, 47, 210, 211**

§ 102 **18, 230, 42, 110, 126, 153**

§ 106A **47, 154, 237, 239**

§ 107 **47, 142**

§ 108 **142**

§ 201 **174, 210, 211, 251**

§ 203 **246**

§ 301 **27, 145**

§ 302 **145**

§ 304 **145**

Visual Artists Rights Act (VARA)  
1990 **47, 237**

# Table of cases

---

## INTERNATIONAL LAW AND EUROPEAN UNION

*Microsoft Corp. v. Commission of the European Communities*, Case T-201/04 [2007] 5 CMLR (11) 846 **266**

*The Minquiers and Ecrehos Case* (France/United Kingdom), 17 Nov. 1953, ICJ Reports 1953, p. 47 [20 ILR 94] **267**

### Australia

*Telstra Corp'n Ltd v. Desktop Marketing Systems Pty Ltd* [2002] FCAFC 112 (Full Federal Court of Australia) **39**

*Victoria Park Racing and Recreation Grounds v. Taylor* (1937) 58 C.L.R. 479 (High Court of Australia) **26**

### Austria

OGH (Austrian Supreme Court) 26 May 1998, SZ 71/92 **25**

### Canada

*CCH Canadian Ltd and Ors v. Law Society of Upper Canada* (2004) SSC 13 (Supreme Court of Canada) **39, 140**

*Lac Minerals v. International Corona Resources Lac Minerals v. International Corona Resources*

[1989] 2 SCR 574 (Supreme Court of Canada) **27**

*Tele-Direct (Publications) v. American Business Information Inc* (1997) 76 CPR (3d) 296, [1998] EIPR D-17 (Canadian Federal Court of Appeal) **38**

### France

CA (Appeal Court) Paris, 18 déc. 1924: *DH* 1925, p. 30 **57**

Cass. (Supreme Court) 1re civ. 1er juill. 1970: D. 1970, p. 734 **54**

Cass. 1re civ. 13r nov. 1973: D. 1974, p. 533 **54**

Cour de Cass., Cass. ass. plén., 7 mars 1986; D. 1986, p. 405: RIDA 3/1986, p. 136 (*Pachot*) **59**

CA Paris, 1re ch., 22 mai 1990: *Légipresse* 1990, I, p. 67 **57**

Cass. Civ. 1ère, 24 March 1993 (*Société Aréo*), RIDA 1993/158, p. 200 **212**

Cass. Civ. 1ère, 28 March 1995 (*Société Termopac*), RIDA 1995/165, p. 327 **212**

CA Paris, 4e ch., 20 nov. 1996, RIDA 3/1997, p. 321 **195**

TGI (Court of First Instance) Paris, 1re ch. 28 mai 1997, RIDA 1/1998, p. 329 **195**

TGI Paris 10 mai 2002, D. 2002, 3257 **195**

*Benhiby v Victores International SAS* (Unreported, May 16, 2006) (TGI (Paris)) **240**

### Germany

BGH (Supreme Court) BGHZ 26, 349, GRUR 1958, 408/409 – Herrenreiter **50**  
 BGH 9 May 1985, GRUR 1985, 1041 – Inkassoprogramm **54, 58**  
 BGH GRUR 1986, 739/740 – Anwaltschriftsatz **54**  
 BGH 17 June 1992, [1993/94] IIC 539 – Alf **207**  
 BGH GRUR 1994, 206/207f. – Alcolix **54**  
 BGH 23 February 1995, (1995) GRUR 673, (1997) 28 IIC 282 – Mauer-Bilder **239**  
 BGH GRUR 1998, 916/917 – Stadtplanwerk **54**  
 BGH 7 Feb 2002, BGHZ 150, 32 – Hundertwasser **238**  
*Welte v. D-Link Deutschland GmbH*, No 2–6 O 0224/06 (LG Frankfurt) (Court of First Instance) (22 Sept. 2006) **116**  
*Welte v. Sitecom Deutschland GmbH*, No 21 O 6123/04 (LG München I) (19 May 2004) **116**

### Ireland

*EMI Records v. Eircom Ltd.* [2010] IEHC 108 **45, 62**

### Israel

*Eisenman v. Quimron* (Israel Supreme Court) 30 August 2000, CA 2790/93, 2811/93, 54 (3) PD 817 **39, 195**

### Netherlands

*Adam Curry v. Audax Publishing B. V.*, Case 334492/KG 06–176 SR (District Court of Amsterdam) [2006] ECDR 22 **116**

### United Kingdom

*Aberdeen Railway Co. v. Blaikie Bros.* (1854) 1 Macq. 461 **260**  
*Adventure Films v. Tully* [1993] EMLR 376 **174**  
*Baigent v. Random House* [2007] EWCA Civ 247, CA **126, 135, 136**  
*Baigent v. Random House Group Ltd* [2006] EMLR 16, ChD **135**  
*Bauman v. Fussell* [1978] RPC 485 **129**  
*Belisle du Boulay and Others v. Jules René Herménégilde du Boulay* (1867–69) LR 2 PC 430 **64, 66**  
*Brighton v. Jones* [2005] FSR 288 **42, 192**  
*Byrne v. Statist* [1914] 1 KB 622 **39, 210**  
*Cala Homes (South) Ltd v. Alfred McAlpine Homes East Ltd* (No.1) [1995] FSR 818 **196**  
*Cantor Fitzgerald International v. Tradition (UK) Ltd.* [2000] RPC 95 **137**  
*Clark v. Cogge* (1607) 79 ER 149 **7**  
*Coffey v Warner/Chappell Music Ltd.* [2005] ECDR 21 **192**  
*Cooper v. Stephens* [1895] 1 Ch 567 **203**  
*Cramp v. Smythson* [1944] AC 329 **40, 186**  
*Creation Records Ltd. v. News Group Newspapers Ltd.* [1997] EMLR 444, ChD **37**

- Designers Guild v. Russell Williams (Textiles)* [2001] FSR 113 **125, 126, 128, 129, 133**
- Donaldson v. Becket* (1774) 4 Burr 2408, 98 ER 257, 1 ER 837 **27**
- Donoghue v. Allied Newspapers* [1938] 1 Ch 106 **126, 127, 129, 172**
- Douglas v. Hello (No. 3)* [2006] Q.B. 125, CA **27**
- Douglas v. Hello!* [2008] 1 AC 1, HL **27**
- Fisher v. Brooker* [2007] FSR 12 (Ch D) **192, 193**
- Fisher v. Brooker* [2009] UKHL 41, [2009] 1 WLR 1764 **8, 63, 64, 106, 192**
- Francis Day and Hunter Ltd. v. Bron* [1963] Ch 587 **18**
- George Hensher v. Restawile Upholstery* [1976] AC 64 **190**
- Godfrey v. Lees* [1995] EMLR 307 **193**
- Graves' Case* (1869) LR 4 QB 715 **39, 194**
- Hadley v. Kemp* [1999] EMLR 589 **42, 191, 192**
- Harman v. Osborne* [1967] 1 WLR 723 **126**
- Hinton v. Donaldson* (1773) (ed. J. Boswell) **24**
- Hollinrake v. Truswell* (1894) 3 Ch. 420, CA **126**
- Hubbard v. Vosper* [1972] 2 Q.B. 84 **135**
- Ibcos Computers v. Barclays Mercantile* [1994] FSR 275 **135, 137**
- Infabrics v. Jaytex* [1982] AC 1 **50**
- Interlego AG v. Tyco Industries* [1989] AC 217, [1988] RPC 343 **40, 187, 194**
- Jefferys v. Boosey* [1854] IV HLC 815 **127**
- John Richardson Computers Ltd v. Flanders* [1992] FSR 497 **137**
- Kelly v. Morris* (1865–66) LR 1 Eq 697 **37, 57**
- Kenrick v. Lawrence* (1890) 25 Q.B.D. 99 **40, 129**
- L.B. (Plastics) v. Swish Products Ltd.* [1979] RPC 551 **126, 128**
- Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 WLR 273, [1964] 1 All ER 465 **15, 27, 37, 41, 187**
- Levy v. Rutley* (1870–71) LR 6 CP 523 **196**
- London County and Westminster Bank Ltd. v. Tompkins* [1918] 1 KB 515 **214**
- Macaura v. Northern Assurance Co. Ltd.* [1925] AC 619 **251**
- Macmillan v. Cooper* (1923) 93 LJPC 113, (1924) 40 TLR 186, PC **40, 56**
- Metix v. Maughan* [1997] FSR 718 **17, 190**
- Millar v. Taylor* (1769) 4 Burr 2303, 98 ER 201 **27, 75, 76, 119**
- Mustad v. Allcock (a/k/a Mustad v. Dosen)* (1928) [1963] 3 All ER, 416, HL **27**
- National Provincial Bank v. Ainsworth* [1965] AC 1175 **26, 115, 144**
- Navitaire Inc. v. easyJet Airline* [2006] RPC 111 **137**
- Noah v. Shuba* [1991] FSR 14 **210, 238**
- Nova Productions Ltd. v. Mazooma Games Ltd.* [2007] EWCA Civ. 219, CA **137**

*Nova Productions Ltd. v. Mazooma Games* [2006] RPC (14) 379,  
Ch D **37**

*Orwin v. Att-Gen.* [1998] FSR  
415 **204**

*Pasterfield v. Denham* [1999] FSR  
168 **238**

*Performing Right Society v. Mitchell  
& Booker (Palais de Danse)*  
[1924] 1 KB 762 **209**

*Prudential Assurance Co. Ltd. v.  
London Residuary Body* [1992] 2  
AC 386, HL **145**

*Purefoy v. Sykes Boxall* (1955) 72  
RPC 89, CA **37**

*Ravenscroft v. Herbert* [1980] RPC  
193 **126**

*Re Ellenborough Park* [1956] Ch  
131 **26**

*Reject Shop plc v. Manners* [1995]  
FSR 870 **40**

*Roban Jig v. Taylor* [1979] RPC  
130 **204**

*Robin Ray v. Classic FM* [1998] FSR  
622 **192, 193, 209**

*Salomon v. Salomon & Co. Ltd.*  
[1897] AC 22 **251**

*Santley v. Wilde* [1899] 2 Ch.  
474 **214**

*SAS Institute v. World Programming  
Ltd.* [2010] EWHC 1829  
(ch) **137**

*Sawkins v. Hyperion* [2005] EWCA  
Civ 365, [2005] RPC 32, [2005] 3  
All ER 636 **18, 40, 41, 44, 126,  
151, 187, 195, 238**

*Stevenson Jordan v. McDonnell &  
Evans* (1952) 69 RPC 10 **209,  
255**

*Stuart v. Barrett* [1994] EMLR  
448 **193, 196**

*Tidy v. Trustees of the Natural  
History Museum* [1996] EIPR  
D-86 **238**

*Tonson v. Collins* (1761) 1  
Blackstone W. 321, 96 ER  
180 **41, 76**

*Tulk v. Moxhay* (1848) 2 Ph 774, 41  
ER 1143 **115**

*University of London Press v.  
University Tutorial Press* [1916] 2  
Ch 601 **15, 23, 38, 40**

*Walter v. Lane* [1900] AC 539 **39,  
40, 56, 194**

*Wilsons & Clyde Coal Co. v. English*  
[1938] AC 57, HL **261**

## United States

*Aldon Accessories Ltd. v. Spiegel  
Inc.* 738 F.2d 548 (1984) **211**

*Baker v. Selden* (1879) 101 U.S.  
99 **125, 127**

*Basic Books, Inc. v. Kinko's Graphics  
Corp* 758 F. Supp. 1522 (S.D.N.Y.  
1991) **153, 175**

*Blanch v. Koons* 467 F.3d 244 (2d  
Cir. 2006) **154, 175**

*Childress v. Taylor* 945 F.2d 500  
(1991) **154**

*Community for Creative  
Non-Violence v. Reid*, 490 U.S.  
730 (1989), 109 S.Ct. 2166, 104  
L.Ed. 2d 811 **211**

*Computer Associates Inc. v. Altai  
Inc.* 982 F. 2d 693 (1992), 20  
U.S.P.Q. 2d 1641 (1992) **136**

*Eldred v. Ashcroft* 537 U.S. 186, 65  
U.S.P.Q.2d (BNA) 1225  
(2003) **307**

*Feist Publications Inc. v. Rural  
Telephone Service Co Inc* 499 US  
340; 18 U.S.P.Q. 2d 1275  
(1991) **38, 41, 125, 152, 174, 181**

*International News Service v.*

*Associated Press*, 248 U.S. 251,  
236 (1918) **27**

*Kregos v. Associated Press*, 937 F.2d  
700, 705 (CA-NY, 2nd

Cir.1991) **127**

*Progress Software Corp. v. MySQL*

*AB*, 195 F. Supp. 2d 328 (D.  
Mass. 2002) **116**

*Rogers v. Koons* 960 F.2d 301 (2d  
Cir. 1992) **153, 154, 175**



# Contents

---

<i>Preface</i>	viii
<i>Table of legislation</i>	xi
<i>Table of cases</i>	xvi
<b>1. Copyright as property</b>	1
I The legal concept of dematerialised property	1
1 The meanings of the term 'property'	3
2 The concept of 'property right'	5
3 The concept of 'property object' or 'thing' or ' <i>res</i> ' in law	10
II Copyright as a primary example of dematerialised property	12
1 The application of the concept of dematerialised property to copyright	13
2 The proprietarian Common law conception of copyright: protection against parasitical unfair competition and free-ride	35
3 The less proprietarian Civil law conception of author's rights ( <i>droits d'auteur</i> ): protection of a person's creation through personality protection	47
III Conclusion	60
<b>2. Copyright-property and the public domain: explanations and justifications</b>	68
I Historical-philosophical and economic explanations of property and copyright-property and their limited usefulness for modern copyright law	68
1 Explanations and justifications of property and copyright deriving from classical political philosophy	70
2 Economic explanations and justifications of property and copyright	91
II A test of political-philosophical concepts: the idea of the public domain as a default position and starting point	97
1 Constructions of the 'public domain'	97
2 Another construction of the 'public domain'	109