

Book Review

Copyright, Mass Use and Exclusivity, by Mikko Huuskonen
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On 13 May 2006 at the Faculty of Law of the University of Helsinki, Mr. Mikko Huuskonen successfully defended his doctoral dissertation *Copyright, Mass Use and Exclusivity*. The opponent was Professor Michael Landau (Georgia State University).

The aim and content of the thesis can be gleaned from the subtitle *On the Industry Initiated Limitations to Copyright Exclusivity, Especially Regarding Sound Recording and Broadcasting*. Huuskonen has primarily set himself the task of tracing how recording and broadcasting industries have initiated changes to copyright law. A historical and economic method is employed, inspired by institutional scholars such as Schumpeter, Coase and North. The author rightly believes that historical readings of IP are becoming increasingly helpful to understanding the impetus for changes that occur. Though, it must be said that the historical/economic approach comes at the expense of detailed legal analysis of individual copyright issues. At the outset (p. 21), Huuskonen also confesses that his attitude to “altruistic motives is rather sceptical; economic arguments seem more accurate, decisive and may challenge ... existing doctrine”. The author’s economic inclination is evident from the abundance of statistics explaining developments in copyright-dependent industries.

Huuskonen initially identifies a number of fundamental technical developments in the cultural sphere (p. 49): 1. printing: reproduction of printed work; 2. sound recordings: the fixation of musical performance; 3. photography; 4. cinema; 5. broadcasting (voice and image); 6. photocopying; 7. VCR, musical cassettes for copying; 8. satellite and cable distribution; 9. Internet; 10. mobile communications. Trying to grasp how copyright dependent industries have responded to these technical changes, Huuskonen re-visits battles fought over copyright from 15 th century Venice and England, to 20 th century changes to the Berne convention. For practical reasons, though, Huuskonen focuses primarily on the emergence of sound recordings, movies/cinema, broadcasting and the Internet, and consequent changes to the Berne convention. The key motivating factors that the author believes have been put forth in these battles are: 1. protection of profits derivable from investments in production capacity or an author’s labour; 2. encouragement of a new developing technology; 3. protection of the author’s human rights (moral rights); 4. certain public interests (education, freedom of speech, rights of minorities, etc.). Throughout the book the author tries to link these motivations to land-mark changes in copyright law. A good example (p. 81) is the following quote from the Magill case, into which the author inserts references to his different motivations for change:

“28. ... [T]he copyright was no longer being exercised in a manner which correspond to its essential function, within the meaning of Article 36 of the Treaty, which was to protect the moral rights in the work [the human rights motive] and to ensure a reward

for the creative effort [the profit motive], while respecting the aims of, in particular, Article 86 [the development motive].”

In a particularly convincing section of the thesis, Huuskonen discusses the reluctance to add protection of photographic works to the Berne Convention (p. 175): “Unlike phonograph, movies, or broadcasting, photography itself did not form a separate and independent business model with a strong profit or development motive. Nor was there an important public interest element. It is apparent that during the discussions of the copyright status of the photograph, there were no Schumpeterian entrepreneurs to defend their economic positions, because there was no independently important economic function of photography as such.” Photography was invented in the late 19th century, but did not gain “list status” in the Berne Convention until the Brussels Conference of 1948.

Another important observation in the thesis is an on-going shift from exclusivity to compensation for right-holders (p. 245): “The basic outcome of every major technology-related modification of copyright legislation during the 20th century was that maintaining exclusivity was not required from the Berne Convention member states if right-holders were economically compensated. ... The compensation has become the core.” Huuskonen believes that this is due to an increased uncertainty about the proper regulatory answers to copyright problems (p. 249): “The ‘mechanism of change’ in this respect seems quite convincingly to be the [legislator’s] uncertainty before a new technical phenomenon, yet understanding that it represents economic significance. The legislator is indeed ‘surprised’, and will not want to decide in favour of any party to avoid too strong market positions. This typically is a pattern leading to compulsory licensing.”

One problem with Huuskonen’s explanations for changes in copyright is the nebulous character of the factors being considered. It is actually quite difficult to think of any change in intellectual property law that could not fairly be said to have arisen from the interests that Huuskonen studies. A sharper focus would perhaps have enhanced the originality of the book and made it easier for policy-makers and subsequent researchers to apply its conclusions. I would personally have preferred if Huuskonen had focused solely on the extent to which new technology has been allowed to gain momentum before copyright is being enforced in practice (point 2, encouragement of new technology). This is something Huuskonen shows has been important historically, but it is not always recognised in present-day discussions on IP.

All in all, Huuskonen has proved to be an acute observer with a keen sense for economic realities. He has also managed to locate particularly telling parts in the history of copyright. The thesis amounts to a thought-provoking and enjoyable exposition over copyright.

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