

## Book Review

***Copyright and Other Fairytales***, by Helle Porsdam (ed).

Cheltenham UK: Edward Elgar, 2006. 172 pp (incl index). ISBN 1-84542-601-0. £49.95.

This book is dedicated to the 19<sup>th</sup>-century writer, Hans Christian Andersen as the 200th anniversary of his birth fell in 2005. It is a collection of eight essays, each of which hypothesises as to how Hans Christian Andersen may have viewed modern copyright. The editor contextualises his works, pointing out that there was no international copyright law during Hans Christian Andersen's lifetime and that the royalties he received from his works were minimal. The introduction of international copyright is charted and updated and a central theme of this tome is how the commodification of copyrightable works disfavours the general public, whilst doling out a windfall to large intellectual property conglomerates.

The first essay is authored by Lawrence Lessig, who talks about culture, creativity and re-creativity, both in our contemporary high-tech age and before this era. He highlights the disjuncture between what technology allows and what copyright law forbids, arguing that this law is a product of a bygone age, and that the current copyright regime has converted the natural impulse to remix into an illegal activity. Lessig gives several examples of stories which have been remixed and argues that remixing, activities such as blogging and peer-to-peer networks all facilitate authorship. Top-down regulation requires permission in order to reuse copyrighted material, yet such permission is often not forthcoming. Creative activity occurs regardless but as a consequence, is often illegal. Technology may be employed to reinforce the law or, indeed to enforce it where it can be easily ignored. Whilst reasoning that the present copyright regimen is overly dependent on lawyers, he claims that the organisation which he has pioneered, Creative Commons, enables creative types to opt out of the legal and technological strictures criticised in the essay – by means of licences. Creative Commons operates within copyright's parameters and participation in its altruism is entirely optional.

The next essay, by author Stina Teilmann, hones in on the emergence in the 19<sup>th</sup> century of a distinction between works and their reproductions in Europe, during which time originals assumed an importance that they had lacked hitherto. The essay concentrates on British and French copyright law and it appears that early English copyright law did not define infringement, which we understand today to mean a production of unauthorised copies. At first, copyright law only applied to books but now encompasses works such as art and music. The right to copy has been curtailed in copyright's evolution: whilst once infringement only applied where the entire work had been copied, a much lesser usage of an original work will now constitute infringement. Copyright is unable to cope with modern technology which facilitates widespread copying of entire works. The author believes that the focus on authenticity or originality which now dominates our copyright law was evident in Hans Christian Andersen's works. For instance, stories such as the Princess and the Pea, in which the hosts wish to be sure of the fact that the lady they are hosting is indeed a genuine

princess, illustrates the emerging distinction between that which is real and that which is not.

Essay number three, by author Uma Suthersanen, asserts that there is a general consensus on the importance of international copyright protection. The chapter alludes to the rise and demise of the author in the 19<sup>th</sup> and 21<sup>st</sup> centuries, respectively. A number of different, competing interests converge in the debate about copyright protection: authors, industry and the public all intersect at the nexus where their interests overlap. Whilst authors' patronage has been reduced, natural rights concepts about ownership of intellectual property still abound. In the absence of international legal protection in the 19<sup>th</sup> century, authors gained control over their works through custom rather than law and Charles Dickens, for instance, received royalties from sales of his works in the US. Support for copyright protection was not universal, however, and while some authors supported this development, others felt that it was unnecessary. Hans Christian Anderson belonged to the latter camp. The recognition of foreign authors' copyright, nonetheless, was to come about gradually in many jurisdictions and was for a time genuinely author-centred rather than being a tool of publishers.

The fourth essay by Leslie Kim Treiger-Bar-Am deals with the issue of adaptations and integrity. This chapter concentrates on the moral right to integrity and describes this as a right to expression rather than principally a protection of reputation. Copyright law in some jurisdictions protects copies, as well as originals, but this is not a universal feature. Protecting derivatives, which include adaptations, may expand the scope of copyright excessively. Hans Christian Andersen remodelled many older stories in the tales that he told and was influenced by his predecessors in the craft. The post-modernist non-acknowledgement of the state of originality is juxtaposed with pre-romantic views, which treated artistic representations as a copy of nature and the romantic view, which distinguishes between a work and its embodiment. Whilst the author accepts the need to protect original, it is argued that protection is also necessary for copies but that such protection should be weaker. Derivative works, which distort the context of the original, damage the initiating author's freedom of expression, rather than their reputation. The right to integrity is intended to preserve the purpose of the author and the manner in which this is expressed, although it is also true to say that no one has a monopoly on meaning.

Chapter 5 of this tome by Fiona MacMillan seeks to ascertain what Hans Christian Andersen would have had to say about today's copyright law. Whilst on the one hand, Hans Christian Andersen respected talent, he may not have approved of the vast expansion in the scope and length of copyright in recent times. A broad fair dealing defence is vital if the intellectual commons is to be preserved. The right to transform works already in existence would likely have appealed to Anderson himself. However, copyright's present role as a vehicle of trade appears to have superseded its potential to promote cultural activity and creativity by preserving works without economic value. This process has metamorphosised traditional definitions of the author, and current practice leads one to conclude that the author has lost his or her traditional association with romance. Commodities, owned by large conglomerates rather than creative works, dominate our cultural output. Whilst Hans Christian Andersen may well have abhorred the marginalisation of the author, he would doubtless have approved of the ground up resurgence of non-traditional users and authorial types such as peer-to-peer networkers and small-scale musicians.

Essay number six, by Michael Blakeney, treats of the protection of traditional cultural expressions, or folklore, in an international political context. As developing countries agitated for and were sometimes granted, nominal legislative protection, enforcement has not been forthcoming. This chapter provides an informative, chronological overview of such initiatives. Apart from the political setting, some of the difficulties in dealing in such an area is that there is little consensus as to the boundaries of the definition of folklore itself. For instance, in some African countries, folklore embraces all facets of cultural heritage. Whilst African copyright law might stretch to covering scientific knowledge, Western concepts of intellectual property tend not to facilitate or recognise rights to evolving subject matter. In Australia, the dichotomy between Eurocentric intellectual property law and cultural products is highlighted, where law and the failure to recognise traditional rights or inept endeavours to fit the recognition of rights within our property-oriented legal system, collide. Judges, in such cases, often recommend legislative intervention, whilst lawmaking bodies around the globe appear to remain inert to such suggestions. Whilst not ideal, copyright law could be amended and broadened to encapsulate alternative definitions of belongings. Moral rights may be employed as a means of protection or a fee for use could be imposed. The employment of authentication marks or public protection models are also potentially viable alternatives. Hans Christian Andersen interwove originality with borrowings from extant folklore and his literary creations have spawned subsequent works. Ideally, intellectual property regimes should facilitate borrowing, whilst simultaneously protecting time-honoured cultural creativeness.

The seventh essay, authored by Lee Davis, seeks to apply open source principles to digital cultural goods. This chapter characterises copyrights as a subdivision of intellectual property especially affected by digitisation, due to the fact that other branches, such as patents and trademarks, are used to protect goods with a concrete physical form. The role of copyright is evolving, and while on the one hand, it excludes others, on the other, it is the bedrock of the General Public Licence. This licence provides a legal structure for encouraging collaborative development of creative works and allowing access to them. The economic basis of copyright is also necessarily affected by the advent of cooperative development: traditional copyright industries seek to privatise and exclude, whilst the philosophy of the open source movement is just the opposite. Digitisation post dated Walt Disney's creative approach to the reworking of Hans Christian Andersen's stories but relied on the existence of a thriving public domain. The open source approach was designed with software in mind and the author explores whether it can be extended beyond software to other works. Whilst the objective of providing access to software is to improve the end product, it may be neither desirable nor appropriate to approach the development of other works in the same way. Hans Christian Andersen did copy stories and his successors, Disney, developed many of these but it is questionable whether these modifications constitute improvements as such. One thing that is certain is that digitisation is not going to disappear and it will be important to optimise this technology, whilst discouraging its misuse.

The final essay by Marieke van Schijndel and Joost Smiers illustrates the fact that our current copyright regime favours conglomerates to the detriment of the individual artist. The foundations of copyright are threatened by digitisation and it is fitting to consider a replacement for the current system, in the interests of protecting artists' rights. The privatisation of knowledge hampers creativity but also sidelines the average artist's interests. For many artists, financial rewards are not an incentive in

themselves. Many cultures lack private intellectual property rights but this does not appear to affect authorial activity. The authors question the extent of originality and point out that privatisation curtails future cultural development. The authors seek alternatives, including liberal licensing regimes such as those provided by Creative Commons but also argue that this produces a vacuous copyright. The effect of licensing is to opt out of the copyright system to a greater or lesser extent and yet the system is also voluntary. Reform within the system is unlikely to occur due to the interests and lobbying power of large conglomerates. Other models include first to market advantages; state intervention where risk is inordinate or a greatly restricted term of protection; and subsidies for socially desirable work. Digitisation fundamentally, shakes the foundations of copyright, and the authors predict its imminent demise.

This collection of essays is a stimulating, topical, informative and thoroughly enjoyable read, and comes highly recommended by the reviewer.

*Maureen O'Sullivan*

Lecturer in Law, National University of Ireland, Galway.

DOI: 10.2966/scrip.030406.487

© Maureen O'Sullivan 2006. This work is licensed through [SCRIPT-ed Open Licence \(SOL\)](#).