

New developments in performers' rights

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Abstract

Recent changes to copyright law have altered the legal position of performers and also, as with authors, given them new rights for online distribution. At the same time, recent collecting society arrangements have been condemned as anti-competitive. The paper looks at the economic aspects of these changes and asks what impact in the marketplace they are likely to have.

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1. Introduction

To an economist interested in artists' labour market, the distinction between the creative artist's copyright and the performing artist's related or neighbouring rights is somewhat puzzling, the more so as in the music industry, where the latter rights mostly apply, the singer-songwriter enjoys both sets of rights, copyright (or author's right) for the composition and the performer's right for the performance of her work. The very little empirical evidence there is on the subject does not suggest that the author's right is more valuable than the performer's neighbouring right – you might say that neither earns much from either right unless he or she belongs to the ethereal ranks of the superstar (Towse, 2001).

The rationale for this distinction is to be found in the Romantic view of the author creating original work as a sort of sacred activity, while the performer merely reproduces the work in performance as a sort of administrator or executive. This implicitly ranks 'creativity' above 'talent' in the artistic pantheon; to an economist that is the equivalent of saying production is more important than marketing – in fact, each needs the other for getting the 'product' to the market. Does the audience favour the song over the singer? I doubt there has been research that can tell us the answer (and if there has been, every opera company in the world would like to hear about it!).

It is often said that a crucial economic distinction between them is that the performer is paid on the spot for his performance whereas the composer has to be rewarded for the (multiple) uses of her work. However, there is no hard and fast economic 'upstream downstream rule' here; historically, the star performer (the *castrato* or the *prima donna* in opera) dictated terms to the composer (witness the plot of Richard Strauss's *Ariadne auf Naxos*) and in some cases, for example, the Mozart concert arias (nowadays considered sublime examples of his genius), the singer commissioned the arias to show off her voice to its best advantage and thought nothing of inserting them at will into the opera at hand, even though another composer was very likely conducting it! In other words, the far more highly rated singer paid the composer a flat fee for the work rather than the reverse situation apparently envisaged by modern copyright law. One therefore has to ask oneself if these conventions of contracts and payments are not just the outcome of historical 'path-dependency' rather than following some legal or economic logic.

What is historically the case, however, that apart from the 'chosen few' superstars, the occupation of performer – whether singer, musician or actor – was held in very low esteem in the 18th and 19th

centuries.¹ Theatres and opera houses were regarded as dens of potential insurgency (hence the continued presence of the *carabinieri* at *La Scala* Milan and the earlier activities of the Lord Chamberlain in England) and female performers were regarded as little better than prostitutes, which sadly some had to become in order to survive the poor pay. Singers' contracts in the Italian opera houses made frequent reference to restraining their 'disorderly' behaviour and they were imprisoned for breach of contract (including, by the way, for not giving a better performance! (Rosselli, 1984).²

The 18th century economist Adam Smith also had an ambivalent view of the performer's talent: "There are some very beautiful and agreeable talents of which the possession commands a certain sort of admiration; but of which the exercise for the sake of gain is considered, whether from reason or prejudice, as a sort of public prostitution. The pecuniary recompence therefore of those who exercise them in this manner, must be sufficient, not only to pay for the time, labour and expence of acquiring the talents, but for the discredit which attends the employment of them as a means of subsistence. The exorbitant rewards of players, opera-singers, opera-dancers. &c. are founded upon those two principles; the rarity and beauty of the talents, and the discredit of employing them in this manner.....Such talents, though far from being common, are by no means so rare as is imagined. Many people possess them in great perfection, who disdain to make use of them; and many more are capable of acquiring them, if any thing could be made honourably by them" (Adam Smith, 1776, *The Wealth of Nations*, Book I, Chapter X, Part I, ed. Cannan; 108-9).

He thus explained the payments to performers as being due to the relative shortage of supply, which was held back by the dishonour attached to the profession. It seems to me likely that the creators of copyright law shared this view both in England, where musical compositions came within the scope of copyright at exactly the time at which Smith was writing, and, successively, in France, Germany (Prussia) and Italy.

Moreover, to pursue the history of musical performance a little further, the distinct professions of composer and musician were slow to grow. Until the end of the 18th century, not only did most do both (even as late as Brahms, the composer made his name as a pianist, as Beethoven, Mozart and a host of others had done before him); indeed, they also were treated by

¹ This view persisted in some cases even until the middle of the 20th century. My grandmother always lowered her voice when speaking of an acquaintance of hers because her daughter was 'on the stage' (it was Dorothy Tutin!).

² Contracts included a ban on spitting on stage and on relieving oneself at the back of the stage!

their patrons as servants (Wagner had to wear servants' livery while at the court of Weimar even as late as the 1840s). In opera, which in the 18th and 19th centuries was the most popular art form and offered the most lucrative work for composers and performers, the composer only slowly emerged as the 'name' attached to the work. Mozart's operas were not named as such in his day but rather by the poet who wrote the libretto – Metastasio or da Ponte (as in 'da Ponte's *Don Giovanni*'). Thus the primacy of the composer as the author to be endowed with copyright only really established itself in the late 19th century – the status of the composer no doubt being assisted precisely by that conferral itself.

The historical evolution of copyright law is, of course, inextricably connected to the ability to make mechanical (and now digital) copies that began with the invention of the printing press. Musical compositions were frequently copied without authorisation during the 18th and 19th centuries but it was the development of recording technologies – sound recording, home recording equipment (VCRs, CD burners) and the internet – that duplicate a work from a master copy that vastly extended reproducibility for performances. These inventions have had a fundamental effect on the way consumers access cultural products and on the labour market for performers over the 20th century. The growth of sound recording and radio had a very deleterious effect on the demand for musicians. (The same could, in fact, be said of actors and music hall players and film but for some inexplicable reason, so-called 'audio-visual players' have not yet acquired the same protection under copyright law, though this may soon change). At the beginning of the 20th century began there was a high level of demand for musicians to play in bands, ensembles and orchestras everywhere from parks to tea rooms, which fell throughout the century to being now about quarter of what it was a 100 years ago (Ehrlich, 1985). The effect of 'canned' music on the employment of musicians in the UK was countered by several moves: first, by getting the BBC agree to restrict 'needle time' and to play so many hours of live music; and second, by getting compensation for the loss of income via rights to remuneration in copyright law. However, performers were not at risk from unauthorised copying until the invention of the cassette and tape recorder and that came over half a century after the decline in the demand for their musicians' services following the inventions of the gramophone and the radio.

It therefore seems from this brief historical survey that there is a somewhat confused story about the distinction in copyright law between the differential treatment of authors and performers and the motives for awarding rights to performers. Whatever the legal distinction is, however, from the economic point of view it does not really make sense. Whether the individual gets a royalty

payment or remuneration as compensation for the use of her work depends upon the way the good or service gets to market rather than on whether the right is an exclusive one (for authors) or merely a right to remuneration as a related right.

With the advent of the WPPT (WIPO Performers and Phonograms Treaty), this distinction seems set to change as performers acquire exclusive rights in the performances. The point of this paper is to discuss the economic implications of this change. The paper begins by sketching the development of performers' rights then discusses the effect of copyright on markets in the music industry; it then moves on to analyse the possible economic effects of the changes to copyright and related rights for performers following implementation of the WPPT.

2. Development of performers' rights

The story of performers' rights essentially begins with the 1961 Rome Convention on neighbouring rights, which forms the basis of national laws and also forms the basis for the WPPT. Performers previously had some rights; to give the example of the UK, performers acquired the right in 1925 to control the fixation and use of their performances (mainly in sound recordings). However, it was only in 1988 that they acquired the right to control recording of live performances and in 1996 that they acquired fully assignable property rights and individual rights to remuneration. Bently (2004) states that "in many ways, these bring performers' protection to a level virtually equivalent to that of authors". However, protection lasts longer for the author than for the performer - 50 years from the date of fixation of the performance for the latter, compared to 70 years plus life for the author.

In the world of the performing arts, a significant distinction is made between the star and lead performers ('principals'), the lesser 'named' performers and the 'nameless' chorus, orchestral players, walk-on players and suchlike. In live performance, the principal performers are often paid on a different basis: they receive fees or other incentive payments, while the other performers are paid a weekly wage. This distinction carries over into contracts in the recorded media. In the music industry, the distinction is between 'contracted' or 'featured' artists and the 'backing' or 'non-featured' artists – the ordinary members of the orchestra or backing band. The former group have royalty contracts based on sales and the latter are paid a flat spot fee at the time of the recording (a studio fee) with no future payment from sales. **Featured artists with royalty contracts must therefore maintain contact with the record label that recorded their work, whereas non-featured ones do not and for a long time, there was no mechanism for tracing their contribution to a sound recording. That, in fact, lead to problems when the so-called Rental**

Directive³ introduced the right to equitable remuneration for the public performance of sound recordings for the non-featured artists because the necessary information had not been obtained from each musician at the time of the recording.⁴

Previously, in the UK at least (other countries had other arrangements), a collective *ex gratia* payment had been made by the record companies' collecting society to the Musicians' Union but, following the implementation of the Rental Directive, that had to be replaced by an individual right with payment based on the performer's contribution

The drafters of the Rental Directive evidently believed that one of the roles of copyright and related rights legislation was to correct the weaker bargaining position of the non-featured performers and that the way to do this was to require that equitable remuneration could only be administered by a collecting society set up for that purpose.⁵ (This is perhaps only one of many examples where the law attempts to 'correct' perceived market failure but, in so doing, risks creating a situation in which the increased transaction costs to users threaten to swamp any benefits - the unintended consequences destroy that which was intended). Collecting societies carry out the task of collecting income from licensing and distributing it to rights owners. In order to distribute revenue on an individual basis, they need a database of information on members' performances as well as of their contact details and this information, predictably, was very difficult and costly to set up *de novo* for non-featured performers (particularly as the right was made retrospective). Such a high initial set-up cost, combined with a low marginal cost of adding one more user, often results in a natural monopoly. Ironically, the collecting society monopolies are now the target of EU anti-monopoly authority attention! Moreover, DRM (Digital Rights Management) promises - though it is some way from delivering - cheap and easy licensing and distribution arrangements for authors' and performers' works and, again, the EU and WIPO seek to 'engineer' the way the market works by legislation and its enforcement.⁶

³ Council Directive 'on rental and lending rights and on certain rights related to copyright in the field of intellectual property' (EC Directive, 1992).

⁴ See Section 4 below for further discussion. For a full account of this change, see Towse (2001a), chapter 5.

⁵ See Reinbothe and Lewinski (1993).

⁶ The question is complicated by the fact that the governance of collecting societies is very different in different countries. Many were in fact set up in the first place by the state under a grant of monopoly and are a sort of state agency. That is not the case in the UK, though the Copyright Tribunal has jurisdiction in case of disputes. Moreover, in some countries, all the licensing rates are set by a court or Copyright Board, further removing the process from the market. Another matter is who actually pays the costs of these arrangements: the administrative costs are usually paid by the rights holders but users may have considerable costs imposed on them, e.g. logging the play of each CD track.

Now the process is being carried one step further by the WPPT awarding exclusive individual rights to performers which can be exercised as they see fit. However, performers' options may well be reduced in some cases: in the Netherlands, the performers' rights collecting society is only able to administer remuneration rights, not individual exclusive rights. Treating performers on an equal legal footing with authors does not necessarily ensure they will be better off financially; it remains to be seen how these individual rights will be administered and whether the labour market responds to give enhanced economic rewards.

3. Copyright and markets in the music industry

The simple economic rationale for copyright is that without 'privatisation' by statutorily created property rights, the creator could not earn the full reward. Once a work has been set down in fixed form (printed, recorded, filmed), it can be copied and so becomes a public good. The creator could not compete with a copier because she must charge a price that covers the fixed cost of creation, while a copier would only have to incur the marginal cost of making a copy, and with modern copying technologies, that is typically very low. The copier also avoids the risk the first publisher takes (copiers don't copy 'lemons'). An unauthorised copier can therefore supply the market at a much lower price. Failure to obtain compensation through the market for the investment in the work decreases (or destroys) the incentive to create and distribute works.

However, the author is rarely in a position to reach the market directly and mostly has to have her work marketed by 'publishers' (record, film, TV, publishing companies and so on – firms in the creative or cultural industries) who act on the assignment or licence of the copyright by the creator.⁷ This means striking a bargain with the publisher, in which, except in the rare case of the superstar, the publisher has the upper hand (Caves, 2000). Once economic rights have been assigned, however, the artist has little residual control over exploitation (though moral rights may not be alienated). Her rights are exhausted upon the first fixation of her performance. In this the law obeys economic logic in preventing hold-ups.⁸ It also demonstrates, in economic terms, that the performer is clearly the agent and the record label is the principal, with the label holding all the important decision rights. When the label decides to delete works from the catalogue, artists can

⁷ The internet is changing this situation to some extent, though most cultural economists think the scope for 'self-publishing' is limited to artists who have already made a name for themselves. The position of performers is somewhat different from that of creative artists here because the performer can establish a reputation through live work.

⁸ That may also be said of composers and sound recordings; for example, a composer cannot control who else records his work after giving permission for the first sound recording.

rarely do anything to stop them. Copyright *enables* artists to earn from their investment but it does not *ensure* they do so, despite the frequently repeated rhetoric and how much they earn from royalties depends on market forces.⁹

For live performances in the theatre, concert hall or other such venue, copyright law protects performers from unauthorised fixation ('bootlegging') but it does not directly affect the payment they receive for the event.¹⁰ In fact, there are big differences in the way creators and performers can be rewarded with or without copyright (Towse, 2003a). What seems to be the case is that the economic organisation of the cultural sector, which varies according to the complexity of the production process, plays a more important role than does copyright law in the contracts between artists and firms in the cultural industries.

3. Primary and secondary markets

An important feature of so-called 'information goods', of which cultural products are a subset, is that they can simultaneously serve two markets, the 'primary' market of sales to end users and the 'secondary' market, where the product is reused for intermediate commercial purposes. This comes about because the core information content of the good is non-rival and because copying technologies have enabled content to be cheaply copied and reused. The 'content carrier' can thus be changed in such a way as to make the good non-excludable as well as non-rival and therefore it become a public good. So, in the world of the music business, the sound recording is sold in the primary market to consumers; the secondary market deals with the reuse of sound recordings in public performance. In the analogue world, the two markets functioned very differently but the distinction has changed with the advent of digitalisation.

The featured performer obtains her reward from the primary market through the contract she makes with the producer of the sound recording, which is typically a royalty contract that pays the performer 10 - 15% of the sales price.¹¹ In the secondary market (in which the copyright owner cannot contract with all users), transactions are organised by the collecting societies, which license the use of copyright content to intermediaries, such as radio stations, etc. Without restrictions imposed by copyright law, the radio station could simply buy a copy of the sound recording and

⁹ See, for example, the item in the Appendix (the phrase put by me in bold).

¹⁰ Sometimes there is a buy-out fee for rights of non-featured performers for TV transmission, etc.

play it; with the prohibition on public performance, it cannot do so without infringing (the former situation pertains in the US - it just goes to show that copyright law is essentially a 'line in the sand': one side is legal and the other is not - and it depends in which country the sand is!). While non-contracted performers (at present) only get remuneration via collecting societies, the contracted featured performers get royalties and remuneration from both the record label and from a collecting society.

The theory of industrial organisation can be evoked here to offer insight into these different arrangements; both transaction costs and property rights approaches to contract theory shed light on them. The starting point of the theory is that the purpose of the contract is to obtain the maximum benefit for each party from the allocation of property rights. In order to achieve that goal, suitable incentives have to be offered to each party, subject to the transaction costs of enforcing the contract. With a royalty contract, performer shares the risk with the publisher (record label) and therefore stands to gain or lose from a work's success on the market, including any revival in its sales stimulated by the same performer's later work, thus giving the performer the incentive to produce consistently high quality works. The record label can exploit this by tying in the performer with an option contract on future work (Caves, 2000). In the case of featured (contracted) performers, a variety of payment arrangements is possible, ranging from one-off spot fee payments that buy-out rights to a 'pure royalty' with no advance payment and little concession of rights (Towse, 2003). Each offers different incentives to the performer in relation to risk bearing and delivery of quality work (Towse, 1999). Watt (2000) makes a particular contribution to the economic analysis of copyright by his analysis of a range of intermediate contracts. Specifically, he points out that it is difficult to see why creators always insist upon sharing risk when an outright sale (buy-out) would be more beneficial. This has also been my thought, though I conclude that the explanation lies in the radical uncertainty (extreme bounded rationality) of the markets for arts inputs and outputs.

This economic approach has been dismissed Cornish (2003), however, on the grounds that the underlying assumption of rational economic behaviour is 'unrealistic' and, as so often happens, he then immediately substitutes his own favoured theory of incentives! - 'undue optimism' (what Adam Smith in 1776 called: "The contempt of risk and the presumptuous hope of success..." Smith, *Wealth of Nations*, Vol. 1, Book 1, Ch. X). Taken as a whole, Cornish's argument is that the courts have taken a reliable stand in the interpretation of contractual phrases such as 'reasonable

¹¹ But minus a charge for 'breakage' and other deductions that reduce the amount to about 85 % of sales revenue (Passman, 1998)

remuneration'. Therefore, the creator can carry on creating being assured that the courts will protect them. That seems an extraordinary stance to take, on the one hand because a good contract should avoid such terms that are so open to dispute and, on the other, because few of us would like to have to rely on the courts for a resolution of such a dispute. This is surely legal paternalism run riot. Cornish does, however, raise the important question of artists' motivation, which is discussed in Section XX.

The economic logic of the organisation of the secondary market through collecting societies is simply that transaction costs of charging for and enforcing copyright and related would be so prohibitively high for the individual that she would be unable to exercise her rights. However, the minimisation of transaction costs leads to a form of licensing that distorts the individual author's and performer's incentive and reward: the so-called 'blanket' licence used by collecting societies is effectively an early form of 'one-stop-shop' licensing that via one licence, grants permission to the user to play any work in the repertoire of all its members (as well as that of members of affiliate societies in other countries), meaning effectively, the whole repertoire. The licence fee is charged according to a tariff based on the type of user (airline, restaurant, etc) and on the approximate number of the licensee's clients (radio audience, restaurant seats, etc.) but it is not differentiated according to the popularity of the performer or work performed, resulting, therefore, in cross subsidy within the collecting society. This distortion is countered somewhat by the rules for distribution, which do take into account the amount of use made of individual works (see next section).

The collecting society regime, which originated with literary authors and publishers, has been adapted to performers with the extension of related rights. It is cumbersome and costly and does not satisfy the criterion of providing an individual incentive or reward. In some countries, collecting societies are dominated by publishers' interests (Kretschmer, 2002). The question now, however, is what is the future of collecting societies as DRM develop. Digitalisation is fundamentally changing the consumption of music away from sales and towards online delivery, and therefore away from royalty payments and towards licence fees, but it is not altering the distinction between the primary and secondary market insofar as there are still end users and intermediate users supplying public performances of music along with other services. If DRM can be targeted as finely as is claimed, all the information needed to remunerate performers can be contained on the sound recording carrier but it is hard to see how some form of collecting society can be avoided. And, even with the prospect of perfect price discrimination, the problem still remains of setting licence fee rates that

offer an individual incentive and reward. However, that is too complex a problem for this paper (see Einhorn, 2004).

So we may sum this section up by saying that copyright gives rights but it cannot ensure the rewards. What determines rewards is a complex interaction of the law, market forces and institutional arrangements. Copyright gives rights to authors and performers but they only have financial value when transferred in some way to the cultural industries: control over works follows the economic logic of the allocation of property rights, usually ending up with the industry rather than the artist. The structure of the cultural industries is therefore an important aspect of the economics of copyright: the more powerful the firm, the greater its bargaining power with the artist and the relatively weaker the artist is in striking a bargain. Certainly in the record industry and typical of most of the cultural industries (often referred to as those 'based on copyright'¹²), is the large oligopolistic corporation, which can dictate terms to all but the top superstars (Bettig, 1996). It can be argued indeed that it is precisely the long term protection of property rights through copyright law that has enabled these giant corporations to develop through mergers that are essentially transfers of copyrights. "Copyright giveth and copyright taketh away". The unintended consequences threaten the intended consequences.

4. Recent changes to copyright law

The foregoing provides a backdrop for considering changes to copyright law. We cannot tell what the overall impact of copyright law is on the structure of the cultural industries as it has guided their development but we can assess the effect of changes to copyright at the margin.

The WIPO Treaties, the so-called 'Internet Treaties', the 1996 WIPO Copyright Treaty (WCT) and the WPPT are the first intellectual property treaties to address the digital network environment, and they require national legislatures bring in measures to create a new exclusive right in favour of copyright owners (including sound recording producers and performers) to make their works available on-line to the public (known as the making available right), to prohibit the circumvention of copyright protection (TPMs – technological protection measures) and to prohibit tampering with rights management.

In Europe, the European Union has addressed compliance of these international obligations of its member states by means of Directive 2001/29/EC *on the harmonisation of certain aspects of*

¹² See WIPO (2003), also Towse (2003b)

copyright and related rights in the information society, the so-called ‘Copyright Directive’, finalised in 2001. Member states are now reforming (some have reformed) their national copyright law where necessary in compliance with the Directive. In the US, the Digital Millennium Copyright Act (DMCA) implements the Treaties. The UK amendments to the 1988 Copyright, Patents and Designs Act came into force in 2003.

The question is: what difference does the grant of exclusive right (say of reproduction) make to performers who already had assignable property rights? I do not pretend to understand the full legal implications of this but shall try instead to consider the economic implications. With an exclusive right, the author or performer can negotiate an individual bargain with a user: let’s say, a musician doing a studio recording as a ‘backing artist’. Previously, she was paid a single 'studio' fee for the recording under a standard contract that bought out her rights but, following the implementation of the Rental Directive, she was entitled to remuneration for her particular contribution to the recording as measured on a track-by-track basis. The remuneration would have collected by a collecting society (PAMRA in the UK) from its public performance licence fee revenue paid by all users who play recorded music in public. The musician reports to PAMRA what tracks of which recording she played on (or believed she did as recording engineers decide the final use of takes). PAMRA now applies its ‘playlist’, which it acquires from radio stations and calculates the payment due to the musician (and the right applies for a period of 50 years from the date of the recording) and distributes it to her.

What of this scenario will change with the creation of an exclusive right? Those ‘in the know’ say “it strengthens the performer’s bargaining position”. The musician now, in principle, can negotiate her own royalty rate with the record label and in principle choose how much to take upfront in a spot payment (and now presumably in an advance on future royalties) and how much to take over the duration of the copyright or, more realistically, the shelf life of the sound recording. This is in contrast to the remuneration right that was collectively negotiated and in many countries set by a judicial process. Two things immediately come to mind: one, contracting is an expensive procedure and it is almost certain that for such an item as a recording session (that is usually a 3 hour one-off contract) there will be a standard contract and standard payment negotiated between the Musicians’ Union (or PAMRA) and the recording industry to enable the market to work (and how will that differ from the former situation?); second, individual negotiation in an over-crowded market (many performers and a few record labels) could easily lead to under-cutting the negotiated rate. It is worthwhile noting at this point that performers managed their affairs before the recent performers’

rights came on the scene by strong trade union control of the supply of musicians' services, backed up by the right to strike (and they did!). Even so, surveys of performers' earnings have shown that few musicians earned above the agreed minimum rate of pay and few earned as much as other workers with similar educational achievement. Unsurprisingly, then, that the record industry has supported the introduction of exclusive rights - but only with the proviso that they be made waivable. But then, so did FIM (International Federation of Musicians) and also every national performers' organisation.....

5. How to evaluate the net benefits of changes to copyright?

On what basis can it be said that an exclusive right is to be preferred to a right to remuneration for a performer? As an economist, the judgement would rest on two basic issues: first, what is the aim of the policy? - ie, in this case, what is the point of the change to the law? That could also beg the question whether alternative policies could not also achieve the same outcome. Second, what are the costs and benefits of the proposed change - and here the wider 'social' as well as the private costs and benefits must be considered.

The economic aim of copyright law is held to be that it offers an incentive to authors, performers and publishers to create. So, the first criterion for judging copyright reform must be does it stimulate creativity (always remembering that this is a question of *marginal* incentives)? That raises difficult fundamental problems about artistic motivation that economists have so far not really grappled with.¹³

Frey is the first cultural economist to have analysed the problem Frey (2000). He distinguished what he calls 'institutional creativity' from 'personal creativity'; institutional creativity is supposed to be motivated by extrinsic rewards that two institutions, the market and the state, can offer, the market through prices for cultural products and the state through direct measures, such as subsidy, and indirect ones, for example regulation in the form of creating and protecting property rights. Personal creativity is more closely related to intrinsic motivation, which in its extreme form is the Romantic driven genius pursuing art for art's sake at all costs. Frey's main insight is that there is a

¹³ A tentative exploration of the economics of creativity is Towse (2004).

‘crowding out’ effect when extrinsic rewards inappropriately are applied to intrinsically motivated effort: extrinsic reward is at worst a disincentive to the artist or anyway just irrelevant.¹⁴

In Towse (2001b), I extended these ideas and consider whether a balance between intrinsic and extrinsic rewards is achieved through government cultural policies that combine financial subsidies with a programme of grants, prizes and honours and copyright law. I suggested that copyright law plays an important role in the balancing act as it provides both intrinsic and extrinsic incentives; this explains the peculiar adherence that artists have for the copyright law because it protects their moral rights even though it yields relatively little financial return.

Cultural economics has produced a number of studies of artists’ supply behaviour: artists are mostly self-employed, multiple job-holders working in two separate labour markets, arts (and arts-related; for example teaching their art) and non-arts; they derive positive utility from arts work and seem to prefer it to leisure; the nature of individual artistic creativity and talent means they are not easily substitutable one for another, and that is also true of the goods and services they produce; and they are motivated by an intrinsic inner drive, which may or may not be rewarded by extrinsic financial payment. Throsby (2001) claims (and I agree) there is evidence that artists do work partly for the money and that the supply of artistic labour time does respond to financial rewards. Frey has rightly said that requires a balance between intrinsic and extrinsic rewards and the elasticity of supply with respect to each is an empirical matter. This is something that should be investigated to test the incentive offered by changes to copyright law. It may well be that moral rights (now also granted to performers under WPPT) offer intrinsic rewards that artists value as much as extrinsic, financial rewards.

A second fundamental issue for economics is the extent to which we judge policies by private efficiency criteria. Most writers on the economic rights accorded by copyright, being heavily influenced by Posnerian law and economics, equate economic rights with providing an incentive to artists to create works of art i.e. they adopt the neoclassical elision of reward with incentive. An alternative legal doctrine stresses ‘just deserts’, that fairness requires an author to be rewarded for his creation; equity not efficiency is the rationale for copyright law. Both these arguments relate to the author’s ability to obtain pecuniary reward. But cultural economists know better than to look only at private benefits. Creativity is not just about producing ‘high art’ or entertainment; it is also

¹⁴ I have to say that I find the idea of demotivation by extrinsic reward somewhat of a nonsense; if intrinsic motivation is so strong – it can surely withstand a bit of financial reward!

about inventing novelty in many dimensions. The Beatles did not only create pop music, they played a leading role in a cultural, social, political and economic revolution. Moreover, creation is a process not a product. Copyright law does not attempt to address these refinements, however: it is not about encouraging creativity in the artistic sense or about producing knowledge but confines itself to protecting authors and publishers of fixed expressions.

The criteria that should be adopted for assessing copyright reform are to be found in cultural policy. I have argued elsewhere that copyright policy must be thought of as part of cultural policy (as it already is in some countries and the trend is increasing); logically, therefore, the objectives of cultural policy – fostering creativity, cultural diversity, freedom of information and expression, broadening audiences for cultural events, etc – should be used to judge whether a reform is an improvement or not. In this connection, it is worth noting that copyright law with its limitations and exceptions already is concerned to protect the wider public interest as well as to offer a stimulus to the production and publication of works. The quote in the appendix from the web site of one of the national associations of the record industry shows that even they know enough to argue for cultural criteria to be used as an argument for copyright reform!

6. Conclusion

“The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers ... I admit, however, the necessity of giving a bounty to genius and learning.” Macauley, 1841.¹⁵

This famous quotation from Macauley demonstrates the clear perception that copyright is a system for getting the consumer (the ‘reader’) to pay for the incentive to the author – in modern terms it internalises the externality that arises because unauthorised copying would reduce the author’s earnings. That is an important point for the selection of policy measures to achieve cultural objectives, one, however, which is not often discussed. By contrast, the alternative incentive system of subsidy to artists is financed by taxpayers, only some of whom are consumers of the goods and services whose production they pay for. Those who are sceptical of subsidy to the arts may well bear this point in mind (and *mutatis mutandis*, copyright sceptics might do so too!).

It was perceived by economists early on that enacting copyright law was not the only means of encouraging the creation of works of literature, art and music since authors (artists) could also be

¹⁵ Quoted in Hadfield (1992).

rewarded by prizes or other forms of state patronage (nowadays, subsidy).¹⁶ Such patronage would directly benefit the artist, in contrast to the copyright system that did so indirectly via the cultural industries.

The point is not that we have to choose between these alternative systems - indeed, it would be now very hard to abandon either. It is rather that in evaluating the supposed claims of a policy or change to the law, we should consider what objectives of the policy are and whether alternative policy means are available to achieve them that produce the same net benefits. Is this how WIPO works when it proposes copyright reforms?

Appendix

The Siren sound of the record industry

(From the Canadian Recording Industry Association's pamphlet lobbying the government for implementation of the WPPT; www.cria.ca).

WHY ARE THE WIPO TREATIES IMPORTANT?

Like all copyright and related protections, the WIPO Treaties provide important economic incentives to creative individuals and companies. They promote national culture, and discourage counterfeiting and piracy. The treaties also provide a substantial legal basis for healthy electronic commerce.

Economic Incentive. The treaties, and copyright law generally, provide creative people 'exclusive rights' to determine whether and how their works are copied and distributed. This **ensures that they enjoy the economic rewards of their creativity**, which serves as a powerful incentive to produce and distribute their creative products. This incentive is real: well over \$1 trillion intellectual-property based products were sold worldwide in 1998, \$38.7 billion in sound recordings alone.

Cultural protection. Copyright also encourages local and national expressions of culture. Inadequate protections deprive local musicians, producers and other creative people of adequate compensation, and subject them to unfair competition from counterfeit copies of international products.

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¹⁶ For a full exposition of the development of the economic analysis of copyright, see Hadfield (1992).

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