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Copyright: A systemic marketplace icon

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Abstract

This article argues that copyright is a systemic marketplace icon, because of the breadth of its effects on market operations. Copyright determines how intellectual property rights for creative work are allocated between the different actors involved in production and consumption, and must balance the civic priority of public access to creative work with the market-driven principle of rewarding private interests for their effort. This duality tends to polarise opinion about its implementation by rights holders, because very different ideological assumptions underpin civic and market objectives. Copyright discourses reveal how these ideological struggles play out among interested parties, who use the concept of copyright to make normative arguments about how markets should be structured, how creative work should be exchanged, and how consumers should behave. In the process, copyright is constructed, explained, branded and promoted as an object to which market actors must orient themselves if they wish to conduct themselves appropriately, and as a rationale for material changes to market structures. Thus, copyright discourses illustrate the breadth and depth of copyright's systemic influence on the marketplace. At the same time, copyright discourses, which invoke both the market and democracy, reveal the implications of copyright for the quality of democracy, the circulation of creativity and the availability of public knowledge and help to explain why ideological struggles over copyright are so difficult to resolve.

In this series, marketplace icons have been described variously as 'brands, products or services that are historically significant for their cultural meanings' (Gopaldas 2016); as a 'basic aspect of the marketplace, something we cannot imagine living without [...] essential to consumption markets and/or culture' (Consumption Markets and Culture 2017); as 'polarising' (Parmentier 2016) and ideologically significant (Holt 2016). While copyright may not seem to be an obvious marketplace icon - it is an intellectual property right, not a product, service or brand - it is a basic aspect of the marketplace, is deployed in the service of different ideologies, and is perhaps one of the most polarising of all market mechanisms. In this article I argue that copyright is a *systemic* marketplace icon, going beyond brand, product or service. It is a disputed concept and a constructed object without which marketplaces cannot function.

Copyright is most often associated with the creative and media industries, but it can be applied to any kind of expression of an idea - though not to the idea itself. We all own copyright in something: images we have posted, letters we have written, objects we have created. Like other creative work (music, film, performance), if these things enter the public domain, our status as rights holders entitles us to recognition (and, potentially, financial reward) as their original creator, and requires our permission to be sought for their use. These fundamentals of copyright are quite simple - but over 300 years of copyright law development, and the contemporary context of complex, globalised markets for creative work, have led to a dense thicket of policy and regulation around copyright. It is disputed territory, continually (re)constructed in networks of actions that generate inevitable tensions between producers, creators, users and other rights holders. Corporations are suspected of using it to realise ideological and economic control over the marketplace, creators need it to secure a necessary source of income and recognition, and users try to assert their right to publicly accessible forms of knowledge and creativity within its parameters.

These kinds of struggles over copyright have always existed, but they are complicated by the advent of a digital age that has blurred the boundaries between creators, consumers, producers and users; made copying, parody and mashups part of our daily culture; and allowed the global circulation of cultural work in the blink of an eye. Copyright law has struggled to keep up with technologies that make copying easy, format-shifting logical, sharing a matter of course. In parallel, the now-global trade in cultural and creative work has prompted the development of international agreements on copyright such as the TRIPS agreement (see World Trade Organisation 2017), that have the effect of standardising domestic laws regardless of national circumstances. As a result, copyright is often accused of being ubiquitous yet unfit for purpose, a danger to creativity and a limitation on consumption in an age of modern, online markets.

In this article I focus on the discursive aspects of copyright's systemic iconicity. I argue that copyright discourses bring the concept into being in law, policy and markets, constructing it as an indispensable object to which market actors orient their activities. Correspondingly, they have material effects on the ways contemporary markets are structured, including the channels and technologies through which the public access and engage with copyrighted work. In other words, copyright discourse simultaneously constructs the idea of copyright, the arena for its implementation, and the subjectivities of the actors it affects – marketplaces, creative work, and consumers¹ (Kretschmer and Pratt 2009; Klein, Moss, and Edwards 2015; Deazley 2006). I engage in particular with the latter point, since it is in the construction of market-related subjectivities that copyright's iconic status is most evident. I begin by considering the basic tensions inherent to copyright – the need to balance public and private interests - before considering in more detail the ways in which copyright discourses are used by different parties to construct marketplaces, creative work and consumers.

Copyright, markets and the public interest

Because creative work is non-exclusive – that is, its use by one person does not deprive others from the same privilege - normal supply and demand mechanisms for setting prices do not apply and markets for creative outputs must be constructed using mechanisms that are socially negotiated (Hettinger 1989). Copyright is one such mechanism: it establishes legal ownership to the intellectual property embedded in expressions of ideas, including the format, specific content and modes of performance through which they are communicated, and prevents work from being copied without attribution. The supply of goods can then be managed through exclusive rights to reproduction, and prices set according to the demand from paying customers.

Copyright was first enshrined in law with the UK's Statute of Anne in 1709. As the first legal confirmation of exclusive rights to reproduction (in this case, relating to books), it also introduced the principle that exclusivity must be balanced by the preservation of public access. Copyright law evolved through a complex series of legal decisions and the protection of the public domain remained a priority for over a century, although the period of exclusivity was gradually extended and protection was granted to international authors. Judges applied moral and philosophical arguments to contemporary contexts and ideas of copyright as a form of property, a right that facilitates market operations, infringement as a matter of economic and social immorality as well as criminality, and a

¹ This article draws on an ESRC-funded research project led by Bethany Klein (PI), with Giles Moss, David Lee and Fiona Philip, at the University of Leeds between 2011 and 2014 (RES-062-23-3027), and on a CREATE-funded project carried out with Giles Moss in 2016-17 (related to AHRC grant ref: Grant Ref. AH/K000179/1). See Klein, Moss and Edwards, 2015; Edwards, Moss and Karvelyte, 2017.

'natural' right to reward for authors, all emerged over time as received wisdom (Kawohl and Kretschmer 2009).

Today, the early balance of public and private interests has shifted, with international and domestic copyright laws now stipulate long periods of exclusivity before creative work is released into the public domain. Nonetheless, the need to balance these two imperatives continues to generate disagreement about copyright's role in contemporary markets, focused on the degree to which laws that seem to favour exclusivity can also protect the 'public domain' as a space for accessing and circulating creative work without restriction, so that the pool of collective creativity and knowledge may continually expand (Deazley and Meletti 2017). Given that limiting public access through copyright law constitutes an imposition on citizens, it must be justified as a proportionate measure not only to lawyers, but also in the public arena (Hettinger 1989); the values it is grounded in should be widely understood by what John Rawls described as 'reasonable' citizens (Sykes 2003, : 17). Copyright's iconic status – that is, its acceptance as a concept that guides the operations of markets and a valid object of attention for all market actors – depends on the degree to which these explanations are accepted.

The duality of copyright is reflected in the different market-related interests that it must serve: private and public rights, individual and corporate subjectivities, local and global regulation, dominant and marginalised groups. These lead to intense debates about how copyright law should be both written and implemented. Civic justifications (copyright as a means of benefiting society) come face to face with market justifications (copyright as a means of incentivising further production), and a discursive battle ensues (Boltanski and Thévenot 2006[1991]; Klein, Moss, and Edwards 2015).

Yet, research shows that these debates have not helped to justify copyright to 'reasonable citizens', nor to clarify the practicalities of copyright in practice (such as defining what counts as copyrighted work, how public and private rights are put into practice, when permission should be sought and when it is unnecessary, and how their normal use of creative works may or may not constitute infringement) (Edwards, Moss, and Karvelyte 2017; Klein, Moss, and Edwards 2015). The mismatch between the interests underpinning claims on each side of the argument has led to scepticism among consumers as to the validity of current regulation and continued 'market failure' in the form of widespread infringement, much of which is normatively established as acceptable social practice (Favale 2014). As Sykes (2003: 6) notes, 'technical infractions are sometimes more in harmony with the spirit of the law than obedience would be.'

The problem is compounded by the digital age, which has brought rapid changes that make the landscape for copyright more complex. These include changing modes of distribution, the ability to create reproductions that are as good as an original, new intermediaries whose responsibility for ensuring public access and/or private reward must be negotiated, and fragmented markets that deliver niche, rather than mass, satisfaction. These affordances have made infringement both more attractive for consumers and harder to pursue for rights holders (Favale 2014; Kotler 1986). Consequently, some consumers use the opportunities delivered by the digital world to 'misbehave' (Fullerton and Punj 1998), undermining both market norms and rights holders claims. They confound the roles of producer, distributor and consumer by taking advantage of technologies that allow them to play with creative work, building on what already exists (as in the case of parodies or pastiche) but also creating and sharing new work in their capacity as 'producers' (Bruns 2008; Bird 2011).

History shows that infringement has always existed alongside legal use and can prompt, rather than shut down, innovation (Ren 2016; Deazley 2006; Kretschmer and Pratt 2009). Consumer

misbehaviour is by no means a new phenomenon, and people will continue drawing on local, situated cultural and social norms about copying, sharing and fostering creativity to guide their practice. In doing so, they will likely contravene national and global copyright laws for a range of reasons: ignorance, strategic decision making, lack of resources, or as a protest against the power of dominant rights holders (Henkel, James, and Croce 2016; Edwards et al. 2015b). Nonetheless, unruly consumers disrupt markets, and so rights holders use discourse alongside formal punishments to persuade and discipline users into more appropriate behaviour. At the same time, copyright activists speaking on behalf of the public interest use discourse to discipline rights holders into a more public-oriented, less restrictive approach to copyright. In the next section, I examine some of these discourses to unpick how their disciplinary work consolidates copyright's systemic presence by contributing to our understanding of what marketplaces are, what kinds of goods circulate in them, and who inhabits them.

Copyright discourses and the construction of contemporary markets

Most copyright scholarship focuses on its legal history, contemporary implementation and economic effectiveness, but overlooks the multiple roles it plays in contemporary markets, where the invocation of copyright has effects that go well beyond matters of legality and finance. Copyright is experienced differently depending on where you are in the chain of production, and motivations for supporting it vary widely. Artists, workers, intermediaries, libraries and archives, commercial users and individual consumers, draw on ideas grounded in marketing, consumption, personal identity, community and connection alongside the rights to reward and access that industry rights holders and activists promote (Phillips and Street 2015; Henkel, James, and Croce 2016; Edwards et al. 2015b; Boyle 2015). Each of these groups has a stake in how copyright is talked about as well as the uses to which it is put. Through marketing, public relations and lobbying activity, they use discourse to frame copyright in ways that have important consequences for how we think about different components of markets, and reveal some of the tensions that mark copyright's polarising iconicity.

For example, despite the fact that sharing has a long history rooted in gift-giving economies and cultural norms around creativity (Cammaerts 2011; Ren 2016; Pang 2008), the use of the terms 'infringement' and 'piracy' by some actors suggests overstepping some kind of mark, imposing oneself on another's territory, and a violation of agreed norms. The term 'rights holders' suggests that individuals or companies can possess copyright (and thus, that it is theirs to give away). On the other hand, the idea of 'fair use' reminds us that copyright has to be justified in the context of wider social norms that invoke collectivity and morality, rather than markets, and protect the democracy-enhancing role of copyright (Favale 2014). This kind of language frames copyright in terms of powerful social norms, rather than only legal obligations or economic necessity.

To illustrate the point further and explain the depth of copyright's systemic iconicity in the marketplace for creative work, I use the remainder of this piece to analyse how two particularly vocal groups – industry rights holders and copyright activist groups¹ – use discourses about copyright to construct ideologically-driven notions of the marketplace, creative work, and consumers.

Constructing marketplaces

Industry rights holders construct their discourses around notions of functioning and non-functioning marketplaces. Markets are presented as a normatively good thing in and of themselves, a relatively fixed set of relationships where clarity rather than confusion reigns. The broader social, cultural and political conditions of their existence are irrelevant or ignored, since they do not matter to the market principles that underpin this view of the world (Boltanski and Thévenot 2006[1991]). The

discourses rest on a number of assumptions. First, a functioning marketplace exists when products deliver a return on investment; copyright enables companies to make good on investment in high-risk products, because it justifies limiting distribution to exclusive channels and preventing unpaid consumption. Second, a functioning marketplace is characterised by a process of fair exchange, where labour and production are rewarded with a financial return. In markets for creative work, labour covers the work of authors as well as those who facilitate the creative process – investors, distributors, promoters and behind-the-scenes workers. Copyright is a means by which these workers can be rewarded, because it secures enough revenue to pay their salaries and invest in development. Finally, a functioning marketplace is one where consumers and producers know their place and their function, and a balance of power exists between them. Producers provide goods that consumers want and consumers purchase those goods legally. Positive market outcomes are thereby delivered: consumers are satisfied; industries survive; creative workers are incentivised to continue to create; countries remain globally competitive; economies remain stable; and creative quality is protected (Klein, Moss, and Edwards 2015; Edwards et al. 2015a, , see also (for example) <http://copyrightalliance.org/about/who-we-are/> and <http://www.allianceforip.co.uk>).

To achieve these outcomes, consumers have to literally ‘buy into’ the idea of copyright, and some campaigns commodify copyright compliance as a pseudo-brand, through certification processes verified by logos that symbolise trust (in the product), (consumer) honesty and (consumer) ethics. Copyright is transformed into a ‘brand’ that acts as a ‘material marker’ of a potent ideology (Holt 2016) that imposes obedience on consumers. For example, the ‘Music Matters’ campaign initiated by the British Phonographic Industry in 2010, and now running across Australia, New Zealand and the United States, introduced a ‘trustmark’ for consumers to look out for in shops as a guide to ethical (read: legal) purchasing choices (Edwards et al. 2015a, , see also www.whymusicmatters.com). ‘Get it Right from a Genuine Site’ is a UK-government-funded ‘awareness campaign’ carried out in partnership with rights holders and Internet Service Providers, in order to ‘educate consumers about the wide range of legal sources of content available to UK consumers and promoting [sic] the value of creative content and copyright which underpins it’ (Intellectual Property Office 2017, see also www.getitrightfromagenuinesite.org). Logos and tag lines provide a shortcut for knowing when one is rewarding creativity by purchasing legal work. Through markets governed by brand recognition and loyalty to the copyright cause, consumers take up the possibilities, identities and futures that copyright can offer them and the artists they love.

In contrast, activist discourses frame markets as fluid processes enacted in changing circumstances, fundamentally altered by digital technologies that allow for hybridity and change in roles, processes and modes of exchange. Rigidity and categorisation of products, artists, formats and ownership are misplaced, because they limit rather than facilitate market transactions, and do not reflect the now variable roles that consumers, artists and industry rights holders play. Therefore, implementing copyright law in an overly prescriptive and deterministic way is outmoded and ineffective. Markets are fluctuating entities that are best facilitated by maximising opportunities for creativity in the public domain, and copyright’s role is to facilitate this by providing a right to recognition and reward, though not at the expense of adequate public access. Copyright policy is cast here as a means of balancing the public and private interests that play into market structures, by integrating exceptions that reflect normal and reasonable user behaviour in the digital age. The adoption of non-commercial versions of copyright such as the Creative Commons model is advocated as a flexible approach to copyright and sharing, that delivers recognition over and above (though not necessarily instead of) economic reward (see, e.g. www.creativecommons.org).

Constructing creative work

Like ideas about the marketplace, creative work is also framed differently in discourses about copyright, depending on who is 'speaking'. In industry marketing campaigns focused on infringement, creative outputs are understood to be private property, subject to formal exchange processes and entitling the creator and/or rights holder to financial reward. The exchange is defined in material *and* experiential terms: in the former case, one makes a purchase and receives an object (a DVD, a CD) in exchange. In the latter, engaging with creative work such as a film or a piece of music, delivers an emotional experience that may be uplifting, inspirational, and memorable – and this, too, should be paid for (Edwards et al. 2015a). For example, the Industry Trust anti-piracy campaign for the film, video and TV industries, *Moments worth Paying For* (<http://www.industrytrust.co.uk/campaigns/moments/>) emphasises the value of the emotion and passion that audiences enjoy, rather than only the product.

The creative process is constructed as a private one, drawing on the idea of a creative genius at work. This is not to say that creation is individualised; on the contrary, teams are involved, but they inhabit the private world of the rights holder. 'Behind the scenes' workers may join forces to produce creative products, but they are contracted to, or employed by, creative industry organisations. In other words, their efforts are, by definition, part of a private enterprise rather than in the public domain. The kind of creativity that generates market-friendly creative work (that is, creative work that can be bought and sold) is situated within these private spaces, where it can be fostered and nurtured – but only with appropriate support (e.g. access to sophisticated technologies, finance, marketing expertise, and controlled channels of distribution) (Industry Trust 2017a; BPI 2014). Creative labour is thereby implicitly framed as precarious, and copyright is co-opted as a factor in the working conditions of creative industries - but in a way that makes consumers, rather than companies, responsible for those conditions. Consumers who purchase products legally provide the revenue required to ensure security for creative workers. Conversely, infringers can be cast as thieves because they are stealing property that they should be paying for, contravening normative exchange processes in the service of their own selfish ends. Not only do they undermine the market by refusing to cooperate with agreed behaviours, but they endanger the livelihoods of creative workers and appropriate products and emotional experiences that they are not morally entitled to enjoy, because they have not paid for the privilege.

The activist perspective of creative work, on the other hand, does not depend on a commercially viable product, nor does it locate the creative process in the private world of corporate ownership. Instead, creative work emerges from the openness and cooperation that underpins the free circulation of ideas in the public domain. Creative work can take many forms, and is associated not only with prescribed roles or actual outputs (e.g. paintings, books, music, films) but also with public interpretations of those forms, such as parody, satire and pastiche. This kind of public creativity should be preserved, activists argue, in part because creativity is an inherently social process (Lessig 2008). Creative work builds on what has gone before and public engagement with creative work is essential because it leads to innovation. Therefore, if markets want to develop creativity, they must protect public access since without it, creativity cannot flourish (see, for example, Copyright for Creativity Coalition 2015).

Activists also frame copyrighted work in civic terms, as a source of knowledge that can contribute to the quality of democracy. For example, the Blocked! Campaign by the UK's Open Rights Group encourages consumers to challenge inappropriate blocks on internet content, arguing: 'Filters can stop customers accessing your business, block political commentary or harm your education' (Open Rights Group 2017). In these narratives, creative work is not only a form of property, but also, potentially, a political intervention that can be drawn on to critique and challenge power. Being able

to participate in civic and political life is predicated on access to knowledge, and so activists argue that excessive restrictions on the circulation of copyrighted work are undemocratic.

Constructing consumers

In markets, the consumer is the point at which copyright law succeeds or fails, since its realisation in practice ultimately depends on whether consumers decide to play ball with the rules and regulations enshrined in statute. However, in consumer-targeted marketing and communication campaigns from industry rights holders, copyright's legal identity tends to take a back seat. It is mainly invoked as a rationale for enforcement: breaking a law justifies the imposition of punishment. This narrative has marked aggressive enforcement campaigns, but exists alongside a more common, softer approach where copyright is explained to users (who cannot draw on sensory, experiential data to understand its importance) and presented as a resource for the construction of a consumer identity framed in terms of market morality (Edwards et al. 2015a).

Consumers who adhere to copyright law by paying for a purchase help to deliver the benefits that the law is designed to facilitate. Obedient consumption delivers positive outcomes for other market actors (e.g. an incentive for creative workers to continue, or a just return for their inspiration and effort), and therefore contributes to the public good via market mechanisms. It is also a route to personal morality: law-abiding consumers are normatively positioned on the side of moral righteousness (in contrast to infringers, whose law-breaking aligns with criminals). The emphasis on morality is complemented by industry discourses that appeal to the enthusiasm and passion that music, film and literature can engender among fans, and co-opt consumers as partners in the creative process. Their (legal) support allows the creative process to happen by ensuring the resources to invest in it are available (Industry Trust 2017b). This emotional rhetoric frames the obedient consumer as a locus of solidarity and loyalty, expressing their commitment to artists and industry (often conflated in these texts) through the purchasing process. To consume well is to be aware of one's responsibility as a fan or supporter; a purely emotional commitment is insufficient for markets. Truly committed consumers translate their passion into legal purchases (Edwards et al. 2015a).

Activists also co-opt consumers for their cause, but frame them as inherently creative members of the public rather than market actors. Instead of constructing their identities in terms of their adherence to copyright, the position taken is that their right to pursue creative activity – whether or not it is formally recognised in a marketplace – needs to be protected. These consumers-as-publics need not respond to the exigencies of copyright law; rather, the law needs to adjust to the normal creative behaviours that they engage in, including parody, satire, sharing and format-shifting (Lessig 2008). It also needs to ensure that adequate access to creative work (including, for example, orphan works) is facilitated. In other words, activists structure consumer identities as members of wider society, engaged in creative collaboration rather than instrumental exchange (see, e.g. Open Rights Group 2017; Copyright for Creativity Coalition 2015).

Conclusion

The discourses described above provide rationales for market structures and interventions. In the digital age, these have included rights-based technologies such as DRM, blocking the display of copyrighted content on YouTube and search engines, introducing streaming services to provide legal access to creative work, file sharing sites that allow legal and illegal online distribution, and alternative forms of copyright such as the Creative Commons initiative. These and other concrete changes to market infrastructure form the parameters for (online) marketplace interactions in

response to the ongoing attempts to justify copyright, and remind us of our status and rights in relation to the market and each other (e.g. as consumer, producer, citizen). As Bartmanski and Woodward (2016) point out, iconicity also has a performative aspect and when copyright discourses are used to construct market subjectivities, they also prompt particular performances that realise these identities in practice and ultimately constitute the (complicated and contested) markets for cultural work that are familiar to us all.

However, the discourses also illustrate the distance between positions taken in debates about this icon. The two aspects of copyright's dual purpose – ensuring both private reward and public access – do not have a common justificatory basis. Market-based arguments focused on private entitlements are invoked to justify personal reward and are difficult to translate into a rationale for public access. Equally, democratic principles and the notion of the public interest, which underpin arguments for public access, are fundamentally at odds with prioritising private interests (Sykes, 2003). As noted in the introduction, these kinds of conflicts are not unusual in marketplace icons; Warnaby and Medway (2016), for example, note that shopping malls may be an obvious iconic site of consumption, but area also *anti*-marketplace icons, insofar as they weaken other marketplaces, such as local high streets and retail centres.

Even as disagreements about copyright continue, its status as a systemic marketplace icon will persist because it is embedded across market practices and processes, and shapes cultural and social norms about sharing and accessing knowledge in the public domain. Its effects reflect the tension between markets and civil society and are particularly visible online, where the rapid pace of change and innovation constantly renews opportunities for consumers to circumvent legal limitations on access, and rights holders respond by introducing new ways to prevent these work-arounds. As a tool for commodifying non-exclusive intellectual property, copyright creates and structures commercial markets for creative work along traditional lines – but it also forces those markets to face their civic limitations. Particularly in the digital age, the price of promoting copyrighted work and policing infringement is both surveillance of activities that were previously private and interference in social and cultural norms (Cammaerts 2011; Turow 2011; van Dijck 2013). In other words, this particular marketplace icon has implications not only for our liberty as market actors, but also beyond the market, for the collective facilitation of democracy, creativity and public knowledge.

Notes

1. Activist groups take many positions on copyright, from rejecting it altogether to advocating only moderate change. In this section I draw on previous research that engaged with the work of activists who agitate for (sometimes fundamental) change, but do not do away with copyright completely.

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