

Economics of copyright and archiving

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Copyright confers on the authors of works of literature, music, art and so on rights to protect their work from being copied. Rights related to copyright – neighbouring rights – offer similar protection to performers, broadcasters and sound recording makers. These rights enable the creator to control uses of their work so that they can obtain a reward for their effort, which is an incentive to create such works. The ultimate purpose of copyright and authors' rights is to encourage the creation of works that might otherwise not exist. That benefits society by increasing creativity but those benefits come at some cost. Authors' rights last for 70 years after the death of the author in many national states and those of performers and broadcasters etc last for at least 50 years from the date of their fixation (again this varies nationally).

Rights are economic rights and moral rights: both have economic aspects but here we concentrate on economic rights. Economic rights refer to the financial reward that authors and performers can obtain by being able to control uses of their works. Copyright relates to works that can be copied and that characteristic makes the creator vulnerable to others 'free-riding' on their effort. Copyright attempts to prevent free-riding by the conferment of rights to reproduce, publish, make available and otherwise exploit protected works. In fact, copyright is a bundle of rights that may be exercised separately and the various rights may have differing value. However, the ability to obtain financial rewards depends on several factors. First and foremost is the economic value the work commands on the market. Though it is often stated in connection with the benefits of copyright that it 'ensures' an economic return or even a 'fair reward', that is misleading: it only does so if someone is willing to pay for it. Typically, the creator trades the rights to a publisher or similar entrepreneur who exploits the work commercially in return for a royalty or other type of payment; how much the work commands depends on the deal that can be struck. Research by economists on earnings from copyright suggests that overall creators do not earn a great deal (though the few superstars have very high earnings). Secondly, there are considerable costs of giving permission to users to use copyright works (licensing uses), collecting the fees for possibly a multitude of uses in many different markets and of ensuring that rights are enforced. These transactions costs – of licensing, bargaining for the rates charged and for enforcing rights – are far too great for the individual creator or rights holder to bear and in order to be able to benefit from their rights, they have to exercise them collectively. That is done via copyright collecting societies (also known as collective management organisations) that act on behalf of rights holders using a 'blanket' licence for the use of all their members' works, that is, they do not license or set a rate for individual works or creators. The third factor is that with digitization, it has become impossible to control use of protected works if copyright law is not respected

(and it often is not) and thus the financial incentive to create is reduced. This last factor is causing a rethink of the copyright system that may necessitate measures to compensate rights holders through regulations rather than via the market. Some national states have a levy on 'blank' media or computers that acts as compensation to rights holders.

For users these rights and their administration impose costs: some are the intended ones of enabling the price for using the work to be set higher than the cost of making a copy (the marginal cost) since the creator has to also be recompensed for the fixed cost in the investment made in creating it. For the author or performer that is the cost of their time, human and physical capital and other outlays; for the publisher, it is the cost of reproducing and marketing works as an economic good or service and the outlay on the fee to the creator. That outlay, of course, may be little or nothing: royalties are paid only after the good has been sold and are based on revenues so there is no upfront cost to the publisher; an advance may, however, be given on future royalties. Users also experience transaction costs of searching for rights holders and negotiating licences; however, for the vast majority of uses these costs are considerably reduced by the operation of the collecting societies, which, though they act for the rights holders, also benefit users by reducing their transaction costs too. The disadvantage of this arrangement is that the copyright collecting societies (which by and large are non-profit organisations regulated by the state) have a monopoly of the rights they administer, which they may exploit and as they control only a restricted set of rights, users have to deal with several collecting societies in order to obtain all the permissions that are needed. So, for example: to broadcast CD or DVD, the broadcaster has to pay licence fees to the composer and lyricist via the performing rights society, to the performer via the performers' collecting society and to the sound recording maker via their collecting society. The licence fees will be based on the revenues of the broadcasting company either directly reported or according to estimates of the number of listeners. The broadcaster is usually required to provide that information as a condition of the licence – a transaction cost borne by the user. Economists recognise that such costs, while inevitable, are essentially wasteful and do not contribute to the incentive copyright is intended to offer nor to the other purpose of copyright, which is to encourage publication of works so that the society benefits from creativity and the production of new work. But the difficulties and cost of doing all this also acts as a deterrent to future creators by forcing them to obtain permissions from and pay existing rights holders for using their work to create new content; thus copyright imposes what has been called the cost of creation that can hold back creativity.

So to sum up: copyright has advantages and disadvantages, benefits and costs. It encourages the creation of works that can be financed via the market, making new cultural content accessible to consumers. Copyright law should ideally balance out both aspects: it should provide sufficient incentive to compensate rights holders while keeping transaction costs and the costs of creation as low as possible. This is the internal tension of copyright law which it almost inevitably fails to deliver, the more especially because the law has by now become excessively complex as it tries to cope with new technologies for copying and with new products. Like most law, it is made incrementally by extending its scope to more and more works as creativity and innovation lead to their production; and it is furthermore subject to what economists and political scientists call 'rent-seeking'

– lobbying by incumbent interested parties who seek to obtain economic advantage by changing the law in their favour. In the case of copyright, that has meant that the term has been inexorably extended, even retrospectively (which can have no economic incentive whatsoever and only produced ‘economic rent’, that is, income that has not been earned), thereby increasing transaction costs of obtaining and managing rights and the cost to users, whether final consumers or future creators.

Implications for archiving

Digitization has revealed a number of unintended problems of copyright, in particular with respect to archiving. The purposes of copyright law in encouraging accessibility to cultural works through making archived material available to the public are being thwarted by several factors. This is especially problematic when the works have been created with the use of public subsidy as the public should have the right to access them. One impediment is the so-called ‘orphan works’ problem: as copyright lasts so long, the vast bulk of works is unavailable on the market (for example, out of print) with the result that there is no record of who owns all the rights associated with such a work. Even though the work no longer apparently has any economic value (and therefore it does not produce any royalties), legal use cannot be made without permission. Copyright collecting societies may be able to supply a licence but as they utilise a blanket licence for all the works in their repertoire, a procedure that significantly reduces transaction costs since only one licence is needed for all, the licence fee may well exceed the value to the archiver of the work and therefore restricts the scope of archiving. A second issue is the requirement that all rights are cleared for every single use of every protected work that is to be made public. Therefore if a film includes text, sounds or images whose rights have not been cleared for digital use or for public archive purposes (meaning that they can be viewed uncounted times by uncounted numbers of people such that each use is not compensated), it cannot be made available to the public unless licences are obtained. Again, the cost of so doing may well be prohibitive where the cost consists both of the licence fees of collecting societies and the transaction costs of searching.

It has long been understood in law and economics that excessive transaction costs can prevent markets from operating. In a number of situations, the cost of clearing rights may exceed the value to the user and so trade does not take place. Where the number of rights holders to an item is very high, this has been called the ‘tragedy of the anti-commons’, evoking contrast to the ‘tragedy of the commons’ which exists where property (such as land or housing) is held in common, giving no one the incentive to invest in any improvement as each rights holder will free-ride in anticipation that another will do so. In the ‘anti commons’ case, property (including intellectual property) may remain unused as the transaction costs of assembling all the rights from many owners exceeds the value to the user. The upshot of this is that neither the creator or rights holder benefits nor do users: the archive cannot be made available so the public also loses out. Another situation in which transaction costs would exceed the value to users is in ‘time-shifting’ – transferring a copyright work, such as a broadcast, to a device for later consumption: this has been deemed, at least in US law under its fair use doctrine, not to interfere with the copyright incentive and so require a further licence or payment. Even so, this economic logic is not always employed in relation to shifting a purchased work between appliances.

There are a number of solutions to this problem via changes to the law which would be economically beneficial. However, the message from economists is basically that the market mechanism cannot solve these problems without the assistance of regulation, the one possible exception being that collecting societies could offer a special rate for archiving. That may however involve further administration costs to members that would reduce their net earnings and therefore act as a disincentive. Statutory licences are already in place for certain activities for which rights clearance would be very costly, for example, the public performance of sound recordings. Such licences require payment of equitable remuneration to compensate creators, performers, sound recording makers and other rights holders, which is mandated to be paid to collecting societies for distribution to their members on the basis of information on other usage, such as play lists. Such a solution could be put in place for archives, though it would not solve the orphan works problem. Legal exceptions could be made but it has to be recognised that exceptions can increase transaction costs of defining and monitoring uses. In general, the more detailed copyright law is, the wider its scope and the longer the term, the greater transaction costs are and the more risk there is of the anti-commons problem.

What emerges from the economic analysis of copyright law is that the balance of access and incentive is an empirical one of net social benefits. It may well be asked what evidence can be brought to bear on this. Copyright recognises the need for incentives to creators via the market but there is little evidence to guide law-makers on what the financial value of those incentives should be: it would obviously be excessively difficult to measure the amount needed in every case, yet without that, copyright remains a 'one-size-fits-all' system that over-rewards some and under-rewards others. Moreover, we do not know what really motivates creativity: is it the response to an intrinsic need or does the payment truly stimulate creators? Moreover, the rights to a very high proportion of works in copyright are held by profit-making businesses, not by the original creator. Valuation of private benefits can be estimated from people's willingness to pay for a work or product containing that work but there is only rarely a direct mechanism for transmission of fees or royalties between the consumer and the creator: most works are mediated by entrepreneurs in the creative industries, combined with other works to form a marketable product and the licensed via a blanket fee by a collecting society. These are the facts of life of the copyright system. Social or public benefit is more difficult to measure because it does not find expression via market prices but rests on less concrete concepts such as cultural value and diversity, the spin-offs of creativity to other creators and industries and simply the value of living in a vibrant creative society. The fact that they are not directly measurable does not mean they should not be taken into account in estimating social welfare, however. Archives are likely to create private social benefits that contribute to social welfare in the ways outlined here and copyright law would not be fulfilling its wider purposes if it inhibited their creation.