What Happened To Creativity?  
Is It Time To Reform Copyright Law?

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Abstract

Copyright law both in the United Kingdom and United States has become too focused around the business interests of right holders. This paper argues that this is not appropriate in the digital era, where content recipients have an increased ability to reuse copyrighted content.

The early eighteenth century aims of copyright law, as put forward by the legislatures, courts and academics, do not suggest that protecting the business interests of right holders alone is sufficient. After investigation, a number of different aims become apparent, such as the "improvement of learning", to preserve order in the book trade, or to reduce certain monopolies. However, the implementation of such laws by the courts has increasingly become focused around business interests of right holders. As early as 1740, in *Gyles v Wilcox*, the Lord Chancellor attempted to consider wider policy issues of copyright, but the circumstances of the case led him to place more emphasis on the business concerns of the right holder. With a few exceptions, it is submitted that this has been the focus of subsequent case law.

Ultimately, courts have placed insufficient emphasis upon the wider issues of creativity. Business interests of right holders are often considered analogous to encouraging creativity, without sufficient consideration of whether this merely perpetuates pre-existing business models to the detriment of new forms of creativity.

It is suggested that courts should not have assumed that protecting business interests is analogous to encouraging creativity. Courts should have considered what makes up creativity, and this paper suggests ways in which this could have been done more broadly. We may do so by focusing upon the work of John Locke. Although courts and academics referring to Locke tend to refer to his labour and
reward theories, this paper looks to his other works which develop a theory of knowledge from which a notion of creativity may be derived.

By focusing upon these aspects of Locke’s works, the paper establishes a detailed set of principles by which creativity could be encouraged. These do not simply consider the interests of pre-existing right holders but also those who are currently content recipients who may wish to re-use copyrighted content. In so doing, some of the initial aims of copyright law, such as the “encouragement of learning”, will be achieved with respect to both right holders and content recipients.

There are the foundations of such an approach to be found both within contract law and laws relating to reverse engineering, although there are limits. Contract law permits discussion of creativity because it explicitly considers the interests of right holders and content recipients, but discussion of creativity is minimal at best. Reverse engineering considers the steps by which new works re-use earlier works, but some courts in the test of “necessity” place too much emphasis upon the interests of existing right holders nonetheless.

The paper therefore suggests adapting elements from these approaches and mixing these with the Lockean principles of knowledge. In so doing, the paper suggests that two systems best permit consideration of creativity. Firstly, for any later works which are substantially based on an earlier work, there should be a single purchase of the original work by the content recipient. The original right holder will financially benefit as a result of network effects. Secondly, for works not substantially based upon one single earlier work, there will be licenses set at specific rates. These will be set by a committee similar in nature to the current UK Copyright Tribunal. These systems enable courts and the Copyright Tribunal to consider the wider issues of creativity. The current copyright systems, based around adversarial court proceedings and with a lack of specific consideration of creativity in Statute, have become too influenced by the immediate arguments of parties to a case. The revised system seeks to distance the courts and tribunal from the immediate needs of right holders.