

Towards a Purposive Copyright System

Review of the book of Daniel J. Gervais,
(Re)structuring Copyright, Edward Elgar, 2017

Book Review

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- 1 In his aptly titled book, *(Re)structuring Copyright*, Professor Daniel Gervais aims to (re)design a copyright system fit for the information age and the knowledge economy. This important and ambitious task attempts to remedy “the deficient structure of copyright” and its “current lack of equilibrium” (p. XII). It is to be achieved by bringing forward the purpose of copyright, as the US Constitution does. For Daniel Gervais, this purpose is nothing less than “human progress, its emancipation through science and the arts” (p. XIII). It is difficult not to agree with this purposive view, but to put it into practice is another thing.
- 2 *(Re)structuring Copyright* is thus a policy-oriented book on copyright. It is also a book very much centered on the international developments in the field of copyright. While some books and academic initiatives over the last years have tried to redefine copyright within the US or European context,¹ this book is unique by its amplitude as its aim is to reshape copyright from an international and comparative

law perspective. (For instance, a book edited in 2018 by Prof. Hugenholtz, *Copyright Reconstructed, Rethinking Copyright’s Economic Rights in a Time of Highly Dynamic Technological and Economic Change* [Wolters Kluwer] also aims to redesign copyright, but only its economic rights and in the EU context).²

- 3 Although the book has a strong normative approach, it also contains more descriptive chapters which shed light on many recent developments. Part I of the book presents the concepts and doctrines of international copyright law in order to identify the structural issues of copyright. Some chapters delve into the history of copyright (Chapter 1 on the common law tradition and Chapter 2 in the international context). This permits to demonstrate that copyright, and its complex fragmentation of the rights (p. 24), was meant to deal with commercial exploitation and was thus directed towards professionals. The issue today is that copyright affects the users and has become a system encroaching on their freedom and, potentially, their creativity. In its review of the flexibility of the three-step test, Chapter 3 compares its application in many national systems, and thus applies the comparative law method, another red line of the book. Chapter 4 contains a review of the protection thresholds (originality and fixation) in a comparative perspective, however,

¹ Some of those books and initiatives are mentioned or discussed in Daniel Gervais’ book, such as the Copyright Principles Project initiated by Prof. Pamela Samuelson (see for example, p. 186-187), and among many others, the book of Prof. Jessica Litman, *Digital Copyright* (Prometheus books, 2006, 2nd ed.) (and its comment by Prof. J. Ginsburg; see p. 211 ff.). *(Re)structuring copyright* also reviews some of the proposals made in Europe such as the Wittem’s group’s proposed European Copyright Code (for ex. on p. 181 ff).

² The book edited by P. Bernt Hugenholtz is also reviewed in this issue of JIPITEC.

with an accent on the common law jurisdictions; thus, the lessons of the Court of Justice of the EU, now of utmost importance for the continental copyright lawyers, are not factored in the analysis. Under an adequate, but somewhat mysterious, title (Vicarious and participative creativity), Chapter 5 tackles the core issue of copyright which arguably prompted Daniel Gervais to write his book: how to deal with user-generated content and the rise of the non-professional user. This leads to interesting reflections on the interplay between copyright rules and various social norms (p. 128 ff). The pages (p. 136 ff.) devoted to the evolution of the adaptation right (a difficult and rarely tackled topic) in national and international copyright law are very interesting. Chapters 6 and 7 aim to define the place of the authors and the users in a well-structured copyright system. They contain illuminating reflections on what value creation means and what type of property should exist in the online context - Daniel Gervais is rather critical about the role of intermediaries, the big filters of the present age. In the chapters which rely on previous articles published by Professor Daniel Gervais; namely, in nine out of the book's 13 chapters, the descriptive component is more prominent with a higher level of detail than in the additional chapters, such as Chapters 6 and 7, which are more policy-oriented and focused on the book's thesis.

- 4 Even though some chapters in Part I looked towards the future, Part II is the more forward-looking section of the book. For example, Chapter 8 presents the “quadrants of authorship”, which accurately remind us that in many instances and for many authors, copyright is not about controlling some uses, but is seen as an entitlement to a share of a revenue pie.
- 5 Part II also contains a series of policy prescriptions that form the core of the book; namely on the best structure of the rights (Chapter 9) and on the exceptions and limitations (Chapter 10). Professor Gervais' proposal is that copyright's economic component should be “a right to prohibit uses that demonstrably interfere with actual and predictable commercial exploitation” (p. 213), which, in turn, requires that copyright be structured teleologically rather than technologically. How to get rid of the technology-dependent delineation of the rights (such as the right of reproduction which, in the digital machine, is often disconnected from real exploitation) remains a huge task however. As to the limitations and exceptions (E&Ls), the book offers to categorize them according to their purpose and role so as to derive principled E&Ls. Particular attention is paid to the application of those E&Ls in the education sector (p. 224 ff.).
- 6 Chapters 11 and 12 examine how to facilitate the licensing of copyright – as Daniel Gervais wants to show that copyright is not mainly a “right to exclude”, but a “right to conclude” contracts. A tool that might help is collective and extended licensing, a topic that Daniel Gervais knows well, not only as an academic, but as a former copyright practitioner. Collective Management Organizations are adequately presented in the book as “cultural agents”, performing diverse cultural functions; however, they are often just perceived as businesses handling large sums of money. Formalities (discussed in Chapter 12) are also potentially a way to facilitate licensing if the focus is not on work registration (on which many proposals were made in the recent years), but on the recordation of transfers – in addition, those last formalities have the advantage to be Berne-permissible. Thus (*Re*)structuring Copyright might require “reform(aliz)ing” it,³ but within the constraints of the existing international framework.
- 7 The last chapter highlights the role copyright may play in development, defined in terms of economic and human development. Relying on a nice definition of development by Nobel price economist Amartya Sen, Daniel Gervais also quotes the words of Professor Okediji for whom development is “a pseudonym for a complex network of benefits associated with economic growth and human social capital” (p. 281).
- 8 The book is not theoretical as it ends – in the Epilogue – with the draft provisions for a New Berne Convention. This re-orchestrated Berne Convention definitely offers food for thought and should be compared with similar attempts to draft new copyright principles, such as the Wittem/European Copyright Code discussed at several occasions in Prof. Daniel Gervais' book.
- 9 Professor Gervais' book greatly benefits from the impressive international career and exposure of the author: he studied in Montréal, Canada, a country which combines a common law and a civil law approach, he then worked at the GATT and WIPO in Geneva, before moving to the US, where, after serving at the Copyright Clearance Centre (Massachusetts), he is now holding the Milton R Underwood Chair in Law at Vanderbilt University Law School, which he joined in 2008. This highly international career, which has also been reflected in previous books authored by Daniel Gervais (including his best-seller on *The TRIPS Agreement: Drafting History and Analysis*, 2018, 5th ed.) explains his 2017 appointment as professor of Information Law, specializing in trade and investment related aspects of the information society at the University of Amsterdam's Faculty

³ I use here the term of Christopher Sprigman in a 2004 Stanford Law Review article commented by Daniel Gervais on pages 264 ff.

of Law. The trade and other economic realities behind the legal veil of copyright were indeed the focus of many of Daniel Gervais' scientific writings. They are also central to the reviewed book. Trying to find a compromise between the "pro-IP" groups which pushed for ACTA, TPP, TTIP, and other TRIPS-Plus agreements and the "anti-IP" lobbies pushing for multilateral agreements to lower protection, Professor Gervais proposes "both higher and/or clearer protection of copyright where needed and new limitations to reflect changes" (p. 295), which happened since the last revision of the Berne Convention in 1971.

- 10 The book is very rich in part because it combines a very normative and well-articulated objective, specifically to restructure copyright, and detailed historical developments. This is evident in Chapter 12, which focuses on formalities. Is the best future not to be built on the lessons of the past?