

# Abbe E.L. Brown, Charlotte Waelde (ed.), Research Handbook on Intellectual Property and Creative Industries

Edward Elgar, Cheltenham, UK/Northampton, MA, USA, 2018

## Book Review

by **Veronika Fischer**, Dr. jur., attorney at law in Karlsruhe, research assistant at the Center for Applied Legal studies, Karlsruhe Institute of Technology (KIT), and Secretary General of the German Association for Law and Informatics (DGRI).

© 2018 Veronika Fischer

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Veronika Fischer, Book Review: Abbe E.L. Brown, Charlotte Waelde (ed.), Research Handbook on Intellectual Property and Creative Industries, 9 (2018) JIPITEC 341 para 1.

- 1 The collection was initiated in the series “Research Handbooks on Intellectual Property” by Edward Elgar. It follows an international and comparative approach and brings together practitioners and scholars to examine current issues in intellectual property law and related fields such as life sciences, geographical indications, indigenous intellectual property, intellectual property exhaustion and parallel imports, and so forth.
- 2 The editors of the volume, Abbe E.L. Brown (School of Law, University of Aberdeen) and Charlotte Waelde (Centre for Dance Research, Coventry University) intend to investigate the significance of intellectual property law for the creative industries. In doing so, they are faced with the challenge of defining the term of the creative industries and at the same time complementing the extensive literature on this topic. For this purpose, the editors identified particular regions and aspects that have been less highlighted in the debate. Furthermore, they added some selected interdisciplinary views. The focus is on proving the legal framework against the backdrop of disruptive technologies, the development of new business models, and legal policy objectives.
- 3 The volume is divided into six parts. **Part I: Setting the Scene**, forms the basis for further investigation in the context of the challenges posed by digitization. *Philip Schlesinger (University of Glasgow)* recalls the discussion about the economization aspect of the creative industries on the one hand and the identity-creating effect of the so-called cultural industries on the other. He then discusses relevant developments in European legislation, in particular the regulation of cross-border portability of online content and the Digital Single Market Strategy, which form a part of an economically oriented Agenda.
- 4 Afterwards, *Mathilde Pavis, Hasan Kadir Yilmaztekin (University of Exeter) and Stina Teilmann-Lock (University of Southern Denmark)* give an introduction to the various intellectual property rights and their respective objectives. While Pavis focuses on copyright and related rights, Teilmann-Lock explores designs, utility models and patents, and Yilmaztekin deals with trademarks, passing off and unfair competition.
- 5 *Christian Handke (Erasmus University Rotterdam)* explores the economic perspective. He addresses resource allocation, market failure and the challenges

of dealing with non-rivalising goods. Meanwhile, the optimal level of protection varies with changing market conditions, the legislator is called upon to balance conflicting interests, fostering creativity on the one hand and facilitating access to protected works for the public welfare on the other hand. In order to provide the legislator with a better basis for decision-making, Handke recommends intensifying empirical research, which is already more advanced in patent law than in copyright law.

- 6 **Part II: National and Regional Perspectives** examines the impact of new technologies and business models in different jurisdictions. *Kristofer Erickson (University of Leeds)* describes various activities by the New Labour UK government since 1997. He notes a significant change in the previously author-centered understanding of copyright and argues for a more balanced approach with the aim of establishing IP as innovation driver.
- 7 In contrast, *Enyinna Nwauche (University of Fort Hare)*, who explores the importance of IP law for the African region, focuses on enhancing the impact of intellectual property rights to fight piracy and counterfeiting. He considers that an increased level of protection could contribute to the development of the cultural industries, although current and reliable figures on their importance are lacking. Additional challenges arise from different cultural traditions and strong market fragmentation. *Yudhishtir Raj Isar (American University of Paris and University of Ahmedabad)* describes the opposite approach for India, where the creative industries, namely the film industry and the contemporary visual arts market are developing without significant efforts to ensure effective IP-protection. Recent legislative activities have focused on broadening limitations and exceptions as well as strengthening the moral rights.
- 8 *Julia Reda (Member of the European Parliament)* is addressing the copyright reform of the European Union. These efforts must be seen in the context of the EU's Digital Single Market Strategy (DSMS) and are aimed much more at creating a single market than harmonizing copyright law. Accordingly, the creative industries are moving into the focus, namely publishing, the film and music industry, as narrowly defined, excluding authors. Meanwhile, in Japan, the Cool Japan Strategy (CJS) programme was set up to boost growth rates in the creative sector. *Emiko Kakiuchi (National Graduate Institute for Policy Studies)*, however, notes that growth is limited, except in software and computing services, including industries that combine hardware and software, such as the automotive industry.
- 9 **Part III: IP, Creativity and Reward** deals with the key issues of sharing and enforcement.
- 10 *Andres Guadamuz (University of Sussex)* traces the emergence of Open Access Strategies. He discusses the different licensing models (e.g., Creative Commons, GNU, and so forth) and their specific conditions (public domain dedications, academic licences, copyleft, non-commercial licences, no derivative works) and examines whether the open access approach is transferable to registry rights. The paper also mentions regulatory approaches such as the EU-Public Sector Information (PSI) Directive.
- 11 *Nagla Rizk (American University of Cairo)* also explores the idea of sharing using the example of the independent music scene in Egypt. On the basis of a collection of interviews, she works out different distribution channels and alternative sources of income, for example through performances and concerts.
- 12 The contribution of *Jane Cornwell (University of Edinburgh)* is based on empirical research in the US, Australia, England, Scotland and Wales concerning IP litigation activity. The data reveal, though incomplete, that a high volume of copyright action is brought by major media companies and collecting societies. *Abbe E.L. Brown (University of Aberdeen)* explores the remedies that may be awarded in the event of success.
- 13 **Part IV: Case Studies: Coping with Legal, Social and Technical Change** examines the relationship between IP and selected sectors of the creative industry, including cultural heritage, dance productions, computer-generated works and museums.
- 14 *Smita Kheria (University of Edinburgh)* opens the chapter with an investigation into the sources of income of visual artists. On the basis of a comprehensive empirical study, she discusses the relevance of copyright exploitation on the one hand and the possibility of excluding third parties from the use of protected works on the other.
- 15 *Amalia Sabiescu (Loughborough University London)*, *Stephen Collins (University of the West of Scotland)*, and *Susy Frankel (Victoria University of Wellington)* discuss the protectability of traditional cultural expressions (TCE). Sabiescu uses the example of the traditional "Romanian blouse" to illustrate the effects that the appropriation of these forms of national identity by the fashion industry has on the individual and the community. Against this background, she argues for a kind of collective protection in favour of traditional crafts (namely geographical indications). Collins recalls various approaches to anchoring the protection of folklore at the international level and the challenges relating thereto, such as the clarification of definitions. They have not yet been implemented in a binding manner but have become

a role model function for some countries. The complexity in establishing protection for traditional knowledge is further substantiated by Frankel using the example of Maori culture and its possibilities of abuse.

- 16 *Charlotte Waelde and Sarah Whatley (both from Coventry University)* discuss the concept of originality in dance on the basis of some case studies. Due to the improved accessibility through new technologies, they propose the establishment of a collecting society for dance productions.
- 17 *Roger Burt (Chartered Institute of Patent Agents) and Colin Davies (independent Intellectual Property Consultant)* explore artificial intelligence systems in the context of intellectual property law. They attribute the authorship of computer-generated works to the program, which in their view, should be recognized as a legal entity by analogy with patent law.
- 18 In a practical report, *Amalyah Keshet (Israel Museum)* clarifies the complexity of the legal issues that museums have to deal with in fulfilling their tasks of acquiring, preserving and promoting their collections. Due to its openness, the fair use clause does not provide a reliable basis and leads to legal uncertainty. Moreover, not all legal systems are familiar with a comparable instrument, thus making international partnerships more difficult. There is a number of community-developed Codes of Best Practices, which can serve as guidelines for museums when dealing with works protected by copyright. Nevertheless, in order to cover their most fundamental tasks, he argues for clear limitations and exceptions, along the lines of those already existing for libraries and archives.
- 19 **Part V: Cross-Sector Issues** turns to related disciplines in order to shed light on the theoretical and philosophical foundations of the IP system. *Jaime Stapleton (formerly of Birkbeck University of London and Christiana Research Group, Copenhagen)* examines in a historical overview how the concept of creativity and the legal framework have changed over time. In doing so, he establishes links to the significant technical achievements, beginning with the early privileges, which regulated printing, up to the digital transformation and the internet, including data economy and its culture of sharing and surveillance.
- 20 The article by *Gregory N. Mandel (Temple Law School)* is based on various studies on the rationales of intellectual property law. The perceptions of the IP system can have an impact on its effectiveness, he argues, and examines both attorney's and lay perceptions. He found that, from a lay perspective, IP is mainly used as a tool to prevent plagiarism while the experts concentrate on the reward function. Natural rights conceptions and expressive theories on the other hand play a negligible role. From these findings he draws conclusions for the design of a functioning system of intellectual property rights.
- 21 *Henning Berthold, Melinda Grewar, Shiona Chillas and Barbara Townley (University of St Andrews)* show the impact of digitization on business models and value creation, in particular how new ventures and businesses are being financed (e.g., crowd funding), work and production is being re-organized (e.g., co-working spaces), and goods are being delivered (e.g., demand-based, direct publishing). The authors agree that distribution mechanisms are the key factor for value creation, and recommend that legislative activities should focus on cultural distribution rather than production.
- 22 *Abbe E.L. Brown (University of Aberdeen), Nicolas Gervassis and Rumbidzai Mukonoweshuro (both of Plymouth University)* draw attention to the links between corporate social responsibility (CSR) and IP. They introduce CSR, provide some examples of its implementation on the subject of sustainability, and recommend a new approach as to the power and enforcement of IP-rights considering the resulting opportunities.
- 23 The collection closes with **Part VI: Foresighting** issues, which should be given greater consideration in the debate on IP law and creative industries. *Nicola Searle (Goldsmiths, University of London)* underlines the importance of economic analysis. Although criticism is not new, she predicts that increasingly available data will lead to improved analysis.
- 24 Another underexplored issue is mentioned by *Irene Calboli (Texas A&M University School of Law and Singapore Management University School of Law)*. She calls for a more diversity-friendly analysis of legal issues, including, but not limited to, race and gender, sexual orientation, religion, nationality, physical and mental disability, age and social status. Initial approaches are to be found at the international level, e.g. the adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.
- 25 *John Hartley (Curtin University)* illuminates the tension between economic and cultural values. In arguing for creative freedom, he draws comparisons with the model of language. New meanings, in his view, are being created through communication, just as copying functions as cultural group-based learning. From this, he concludes to concentrate on so-called knowledge groups instead of individuals, works and property.

- 26 Starting from some reflections on Greek mythology and folklore, *Valdimar Tr. Hafstein (University of Iceland)* also defines creativity as a cumulative process. He points out, that the Gutenberg era is rather a brief exceptional phase, while cultural practices such as copying, borrowing, remixing and sharing have a long tradition.
- 27 In summary, the collection addresses the challenges associated with digital transformation and offers the opportunity to place them in a larger context. Following the idea of globalization, the international comparison provides new insights. In addition, some aspects are recalled which were partly superimposed in the recent debate on intellectual property rights. The volume also looks at countries and regions outside the transcontinental and Anglo-European legal sphere, thus adding an additional dimension to the intellectual property rights debate. The same approach is reflected in the investigation of previously neglected fields beyond the traditional and well-known categories of protected works in the area of literature, music and film. In some cases, the volume offers pragmatic and effective solutions, without making use of legal instruments. Philosophical, economic and ethical contributions pave the way for a change of perspective and encourage us to think out of the box.