

Book Review: Abbe E.L. Brown and Charlotte Waelde (eds), *Research handbook on intellectual property and creative industries* (Edward Elgar Publishing, 2018)

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Law of intellectual property (IP) has been evolving and keeping in step with more general advancements in technology and other developments in society. At the same time, the sector of Creative Industries (CI) is now being recognised for its vast contributions to value and jobs creation. The UK Government has launched a number of initiatives to boost its Creative Industries sector, featured in the new Sector Deal (2018).¹ This deal represents an agreement between the government and the creative industries sector, through the Creative Industries Council (CIC),² which aims to unlock the growth of creative industries. To that aim, the Sector Deal will invest more than £150 million across the lifecycle of the Creative Industries. The Government has further recognised the monumental changes and challenges of the fast-changing technology, which are at the forefront of the 2018 policy paper ‘Culture is Digital.’ Here, the Government highlighted that “The UK has a dual competitive advantage in creative and technological skills and our future prosperity will be driven by this particular combination of strengths.”³ The adequate protection of the Creative Industries, in this technologically fast-developing environment will be particularly important in light of the inevitably approaching Brexit.

The role of IP law in the Creative Industries is addressed in the timely edited collection *Research handbook on intellectual property and creative industries*, skilfully edited by Abbe E.L. Brown and Charlotte Waelde,⁴ which comprises of twenty-nine contributions.⁵ The overarching premise is that the Creative Industries are in a time of change,⁶ which is aptly reflected in the diverse selection of contributions to this collection. The aim of this book is the assessment of the role of IP law in the Creative Industries, and the editors find that the stance of commentators has now moved from apprehension to “tolerance.”⁷

¹ Creative Industries: Sector Deal (26 March 2018), available <https://www.gov.uk/government/publications/creative-industries-sector-deal> (accessed 14 September 2018).

² <https://www.gov.uk/government/groups/creative-industries-council> (accessed 14 September 2018).

³ Policy Paper (7 March 2018), available: <https://www.gov.uk/government/publications/culture-is-digital/culture-is-digital#executive-summary> (accessed 14 September 2018).

⁴ Abbe E.L. Brown and Charlotte Waelde (eds), *Research handbook on intellectual property and creative industries* (Edward Elgar Publishing, 2018) (Brown and Waelde).

⁵ Contributors: H. Berthold, A.E.L. Brown, R. Burt, I. Calboli, S. Chillas, S. Collins, J. Cornwell, C. Davies, K. Erickson, S. Frankel, N. Gervassis, M. Grewar, A. Guadamuz, V. Hafstein, C. Handke, I. Hargreaves, J. Hartley, Y.R. Isar, E. Kakiuchi, A. Keshet, S. Kheria, G.N. Mandel, R. Mukonoweshuro, E. Nwauche, M. Pavis, J. Reda, N. Rizk, A. Sabiescu, P. Schlesinger, N. Searle, J. Stapleton, S. Teilmann-Lock, B. Townley, C. Waelde, S. Whatley, H.K. Yilmaztekin.

⁶ Brown and Waelde (n4) 2.

⁷ Brown and Waelde (n4) 8.

Part I offers some key definitions on the Creative Industries sector,⁸ the relevant areas of IP law⁹ and the economic perspective.¹⁰ In the opening contribution Schlesinger offers an insight into the complex dynamics of the EU cultural policy, as it relates to the Creative Industries. In a comprehensive overview of different initiatives (*i.e.* Creative Europe 2014-2020; audio-visual industries and the Digital Single Market), Schlesinger finds that there is a “long-standing tension at the heart of the EU’s”¹¹ programmes in support of the Creative Industries sector: culture as a common good in building identity, citizenship and communities as opposed to culture as economic resource.¹² Pavis offers a brief, yet useful sketch of copyright and performers’ rights, finding that the distinction between true creativity (authors) and mere forms of interpretation, or lower forms of creativity (performers) results in a far more generous protection for authors. This divide is an obsolete one, long outgrown by the Creative Industries sector.¹³ Teilmann-Lock introduces some basic features of design, utility models and patent protection, whereas Yilmaztekin maps out the laws on unfair competition and trade marks. Overall the introduction of IP laws relevant to the Creative Industries is welcome, but readers wishing to explore IP law in detail, will have to turn to other contributions.¹⁴ This first part is rounded by Handke and his economic analysis of IP (specifically copyright), in which he highlights that it is not “a given” that stronger copyright protection always fosters creativity or guarantees a further supply of creative works.¹⁵ Although foreign to lawyers and their terminology, (welfare) economic theory, supported with empirical evidence, can be useful for the future drafting of IP policy.¹⁶

Part II offers a further insight into some national¹⁷ and regional perspectives.¹⁸ Erickson offers a brief, yet concise overview of the UK policy, together with its origins and the relationship between IP protection and firm sustainability. Nwauche briefly examines areas of improvement in IP law and enforcement mechanisms that would improve Creative Industries’ contribution to GDP in Africa, which is at present modest. Isar’s contribution on India is limited to a look to the current commercial success of

⁸ Philip Schlesinger, ‘Whither the creative economy? Some reflections on the European case’ in Brown and Waelde (n4).

⁹ Mathilde Pavis, ‘Copyright and performers’ rights in the creative industries: old laws for new challenges;’ Stina Teilmann-Lock, ‘Design, utility models and patents;’ and Hasan Kadir Yilmaztekin, ‘Passing off, unfair competition and trade marks’ all in Brown and Waelde (n4).

¹⁰ Christian Handke, ‘Intellectual property in creative industries: the economic perspective’ in Brown and Waelde (n4).

¹¹ Schlesinger (n8) 23.

¹² Schlesinger (n8) 23-24.

¹³ Pavis (n9) 37-38.

¹⁴ IP law is explored in many texts, for a recently updated contribution with comments on IP after Brexit, see Lionel Bently *et al*, *Intellectual Property Law* (5th edn, Oxford University Press, 2018); also David I Bainbridge, *Intellectual Property* (10th edn, Pearson, 2018).

¹⁵ Handke (n10) 65.

¹⁶ Handke (n10) 76.

¹⁷ Kristofer Erickson, ‘Intellectual property and creative industries policy in the UK;’ Yudhishtir Raj Isar, ‘The Creative Industries and intellectual property in India;’ Emiko Kakiuchi, ‘Cultural creative industries from a cultural policy perspective: the case of Japan;’ all in Brown and Waelde (n4).

¹⁸ Enyinna Nwauche, ‘Intellectual property and creative industries policy in Africa;’ Julia Reda, ‘If all you have is a hammer: promoting the creative industries through EU copyright reform;’ all in Brown and Waelde (n4).

Entertainment and Media Services; whereas Reda warns of the risks in the current EU approach, under which Creative Industries' interests are part of the greater copyright reform project.¹⁹ Finally, Kakiuchi finds that the number of policies in the field of Creative Industries does not secure its success, through the example of Japan.²⁰

Part III investigates two main themes: sharing²¹ and enforcement.²² In light of the great success of the openness movement, Guadamuz explores the use of different models of IP licensing in achieving the stated objective of sharing for the common good. Accordingly, he finds that practices have been very successful in the copyright/creative context, but less so in the patent/science context. Through the presentation of results of an original empirical study of the music industry in Egypt, Rizk espouses some interesting perceptions and trends in this creative field. Cornwell offers a literature review of existing empirical studies on IP enforcement, but mostly welcomes further empirical research on IP enforcement in the Creative Industries. To conclude this part, Brown offers a comparative overview (UK and US mostly) of civil remedies for IP infringement, highlighting issues of overlap among IP, Human Rights and Competition Law. The author concludes that more policy attention is needed with respect to civil actions and the Creative Industries.²³

Part IV investigates broader issues through a number of interesting case studies, including visual arts;²⁴ traditional fashion;²⁵ dance;²⁶ traditional knowledge in folklore²⁷ and more generally;²⁸ software and artificial intelligence (AI);²⁹ and museums.³⁰ A most interesting and original study on visual arts by Kheria uncovers that copyright is important to visual artists and that it should be included in their education.³¹ Sabiescu finds that authenticity is important in heritage crafts (the example of the Romanian blouse) and it is here that IP law has a potential role to play.³² In another original and interesting study of dance, Waelde and Whatley explore notions of ownership and authorship and the apparent disconnect between dance communities and the law. Collins demonstrates the underlying complexities

¹⁹ Reda (n18) 97.

²⁰ Kakiuchi (n17) 102-103.

²¹ Andres Guadamuz, 'Open approaches to sharing: registered and unregistered rights,' Nagla Rizk, 'Open approaches to sharing: Egypt's independent music – a realm of sharing and creativity,' both in Brown and Waelde (n4).

²² Jane Cornwell, 'Intellectual property enforcement: empirical consideration of enforcement action,' Abbe EL Brown, 'Enforcement and remedy: what is success? IP litigation and the Creative Industries,' both in Brown and Waelde (n4).

²³ Brown (n22) 154.

²⁴ Smita Kheria, 'Visual arts: artists' voices from the field' in Brown and Waelde (n4).

²⁵ Amalia Sabiescu, 'Problematising heritage crafts authorship and ownership: steps towards the intellectual property protection of the traditional Romanian blouse' in Brown and Waelde (n4).

²⁶ Charlotte Waelde and Sarah Whatley, 'Performing arts: a study of dance' in Brown and Waelde (n4).

²⁷ Stephen Collins, 'Traditional knowledge: protecting the intangible and tracing the development of international protection for folklore' in Brown and Waelde (n4).

²⁸ Susy Frankel, 'The creative sector and traditional knowledge' in Brown and Waelde (n4).

²⁹ Roger Burt and Colin Davies, 'Software: intellectual property and artificial intelligence' in Brown and Waelde (n4).

³⁰ Amalyah Keshet, 'Copyright in museums' in Brown and Waelde (n4).

³¹ Kheria (n24) 170.

³² Sabiescu (n25) 194.

surrounding the legal protection of folklore (or as designated by the World Intellectual Property Organisation (WIPO):³³ Traditional Cultural Expressions) and offers a rich historical overview of international efforts in regulation, finding that the challenge to define folklore persists.³⁴ Frankel continues this debate by discussing the overlap between the creative sector and traditional knowledge, particularly in light of the increasing international borrowing of the creative sector from the traditional knowledge of indigenous peoples. Although not all solutions are legal in nature, legal norms are important in the designation of a fair and just public domain.³⁵ Outside the context of the creative sector, Burt and Davies map the issues raised by artificial intelligence (AI) in IP law, particularly questions of authorship and ownership. Drawing analogies with the creation of a corporation, they call for the creation of a legal persona to accommodate the AI and its authorship or inventorship in IP law.³⁶ Returning to a traditional form, Keshet, as a non-legal expert, presents a highly interesting case study on museums and finds that copyright today is a major concern for museums, which today wear “two hats” in that they act both as cathedrals and businesses.³⁷ Out of necessity, museums are increasingly relying on community-based practices in areas where IP law is unclear or under-developed: “[m]useums as well as other creative industries have come to depend on community-developed Codes of Best Practices to fill in practical gaps legislation has not covered.”³⁸

Part V brings the book back to some issues of wider application, from the perspective of theory and philosophy;³⁹ notions of creativity;⁴⁰ business models⁴¹ and corporate social responsibility.⁴² Stapleton explores the “thorny issues of creativity”⁴³ through historical development of the concept (either as an aspect of a person or the process of idea generation), and in the context of the now digital culture in which the audience demand contributes to the cultural expression generation.⁴⁴ Stapleton also imports the notion of the changing relationship between creators and users, which in the digital space, has been “invaded by aggressive data collectors.”⁴⁵ Notions of cultural and digital commons are now complemented by surveillance commons.⁴⁶ Mandel explores notions of creativity, reward and IP through the perception of people. According to empirical studies Mandel finds that as long as there is a disconnect

³³ World Intellectual Property Organisation.

³⁴ Collins (n27) 228.

³⁵ Frankel (n28) 240.

³⁶ Burt and Davies (n29) 252.

³⁷ Keshet (n30) 269.

³⁸ Keshet (n30) 264 (particularly best practices on what constitutes fair use and thereby does not amount to copyright infringement).

³⁹ Jaime Stapleton, ‘Theory and philosophy’ in Brown and Waelde (n4).

⁴⁰ Gregory N Mandel, ‘How people understand intellectual property, creativity and reward’ in Brown and Waelde (n4).

⁴¹ Henning Berthold, Melinda Grewar, Shiona Chillias and Barbara Townley, ‘Appropriating value: on the relationship between business models and intellectual property’ in Brown and Waelde (n4).

⁴² Abbe EL Brown, Nicholas Gervassis and Rumbidzai Mukonoweshuro, ‘Corporate social responsibility, intellectual property and the creative industries’ in Brown and Waelde (n4).

⁴³ Stapleton (n39) 275.

⁴⁴ Stapleton (n39) 279.

⁴⁵ Stapleton (n39) 288-289.

⁴⁶ Stapleton (n39) 293.

between the perception of the people on the function of IP law (to prevent piracy) and its justification, challenges to the legitimacy of IP law will persist.⁴⁷ Berthold and others offer an insight into diverse approaches to “value creation and its appropriability through IP exploitation”⁴⁸ in the Creative Industries, or as they prefer, the “content industries,”⁴⁹ supported with rich illustrations from practice. Appropriation of value is, as explained here, at the “core of the business model concept,”⁵⁰ with a conceptual interlocking between IP and capture of value.⁵¹ Unfortunately, IP law is not responding well to the ongoing changes caused through digitisation.⁵² To conclude this part, Brown and others explore corporate social responsibility (CSR) in the sector, with the aim to “offer a fresh reality for IP.”⁵³ Authors warn that the current WIPO stance to CSR and IP is “narrow and profit-based,” which could result in the creation of “unwelcome precedent” with respect to the understanding of CSR and “the development of future discussions on the social impacts and dynamics of IP rights.”⁵⁴ Authors find here that there is a fundamental need for more CSR in the Creative Industries and offer a series of recommendations for best practices with respect to IP in the Creative Industries.⁵⁵ Overall, the authors aim to “build a new, nuanced and context-specific approach to CSR and IP, which is consistent with a cultural and social perspective on the Creative Industries.”⁵⁶

Part VI concludes this edited volume with an element of fore-sighting. In its first contribution, the existing and future roles of economics are examined.⁵⁷ In the second contribution, issues of diversity are explored.⁵⁸ The third outlook to the future focuses on issues of language in the creative economy.⁵⁹ The final contribution of the book closes with different perceptions of creativity.⁶⁰ Challenges that still lie ahead are: (1) improving the robustness of research into the economics of IP and advancing the discipline to sometime reluctant IP audience (policy and industry);⁶¹ (2) to shift the core value of CI from profitability to promotion of diversity⁶² and thereby creating a more inclusive debate, “in which diversity may find a deeper appreciation in Creative Industries;”⁶³ (3) the challenge of the current misconception of creativity and the resulting “corporate overreach,” which can be addressed through a shift in IP’s

⁴⁷ Mandel (n40) 301.

⁴⁸ Berthold *et al* (n41) 303.

⁴⁹ Berthold *et al* (n41) 324.

⁵⁰ Berthold *et al* (n41) 308.

⁵¹ Berthold *et al* (n41) 310.

⁵² Berthold *et al* (n41) 324.

⁵³ Brown *et al* (n42) 327.

⁵⁴ Brown *et al* (n42) 333.

⁵⁵ Brown *et al* (n42) 342-345.

⁵⁶ Brown *et al* (n42) 347.

⁵⁷ Nicola Searle, ‘The hard sell: economics and intellectual property policy in the creative and cultural industries’ in Brown and Waelde (n4).

⁵⁸ Irene Calboli, ‘Creative industries, diversity and intellectual property’ in Brown and Waelde (n4).

⁵⁹ John Hartley, ‘Creative economy: industry versus language?’ in Brown and Waelde (n4).

⁶⁰ Valdimar Tr Hafstein, ‘Distributed, cumulative, collaborative, collective creativity’ in Brown and Waelde (n4).

⁶¹ Searle (n57) 351.

⁶² Calboli (n58) 360.

⁶³ Calboli (n58) 359.

attention to “knowledge clubs,” modelled on James Buchanan’s 1965 model of ‘club goods;’”⁶⁴ and (4) the changing nature of the models of creativity and sociability as the result of the digitisation of the cultural sphere,⁶⁵ which is not yet recognised in the law.⁶⁶

This book is a welcome contribution to the existing literature on IP law and more importantly a rich source of expert perspectives on the details of the overlap between IP law and the Creative (Content or Cultural) Industries. Specific challenges for the law of IP in the Creative Industries are increasingly also recognised in the need for universities to engage in cross-disciplinary teaching and learning.⁶⁷ For example, at University of Wolverhampton, the Faculty of Arts and School of Law are combining their arts and law student cohorts in joint projects, in which both the world of art and law can learn from each other. This book will provide a useful resource in these cross-disciplinary efforts of bridging the gap between the creative and legal communities.

⁶⁴ Hartley (n59) 376-377.

⁶⁵ Hafstein (n60) 379.

⁶⁶ Hafstein (n60) 380.

⁶⁷ Interviews with visual artists confirmed that they would have liked to have IP education as part of their arts studies, Kheria (n24) 170.