



RCUK Centre for Copyright and New Business  
Models in the Creative Economy

[www.create.ac.uk](http://www.create.ac.uk)



Martin Kretschmer, Director  
Professor of Intellectual Property Law, University of Glasgow



# CREATe Themes

40 Projects; 80 Partners; empirical focus

- *Creators and Creative Practices*
- *User Creation, User Behaviour*
- *Good, Bad and Emergent Business Models for Creativity (including Openness)*
- *Policy and Lawmaking for the Digital Age (including Enforcement and Intermediaries)*



# Digital copyright: 20 years of crisis

- **WIPO Copyright Treaties 1996 (digital agenda)**  
Digital Millennium Copyright Act (DMCA 1998)  
InfoSoc Directive (2001/29/EC)
- **Limitation of liability for service providers**  
DMCA (1998)  
e-Commerce Directive (2000/31/EC)
- **Term extension**  
US Copyright Term Extension Act (CTEA 1998)  
Term Extension Directive (2011/77/EU)
- **Enforcement** (France Hadopi 2009, Korea Art. 133bis/ter 2009, UK  
~~DEA 2010, US PIPA/SOPA 2012, ACTA 2011/12~~)
- **Exceptions** Fair use (Singapore 2005, Israel 2007, Canada 2011);  
Orphan works (EU 2012); Marrakesh Treaty (2013)

# Four inconvenient truths about copyright

## **1. Copyright does not secure the independence and dignity of the artist.**

Median earnings are low. Contracts, not ownership define working conditions.

## **2. Consumers cannot be forced to spend money.**

Those who are most unruly, also spend the most. Understanding behaviour is the key to successful business models and effective enforcement.

## **3. Non-use. After 50 years, less than 10% of published works remain commercially available.**

Rightsholders are less reliable guardians of our heritage than the public domain.

## **4. Copyright policy lacks an independent evidence base.**

There is an growing body of (peer reviewed) empirical knowledge about the economic and cultural effects of copyright law. Policy making has largely ignored it.

# 1. Independence and dignity of the artist

*Directive on the harmonisation of certain aspects of copyright and related rights in the information society: Information Society Directive (2001/29/EC)*

*Recital 10: “If authors or performers are to continue their creative and artistic work, they have to receive appropriate reward for the use of their work...”*

*Recital 11: “A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.”*

# 1. Independence and dignity? (cont.)

## The empirical reality

- Cultural markets are winner-take-all markets  
The top 10% of creators receive a disproportionately large share of total income (for literary authors: 60-70% of total income; for composers/songwriters: ~80%)
- Median earnings are low
- Portfolio lives are typical  
Most creators have earnings from another source (second job, partner etc.)
- Bargaining outcomes are tilted towards bestsellers
- 'Global assignments' of rights are common (transfer of economic exploitation rights)
- Statutory ownership makes little difference  
(Kretschmer & Hardwick 2007; Kretschmer, Bently, Singh, Cooper 2011)

# 1. Independence and dignity? (cont.)

## From the living to the dead

- Example: Resale Right Directive (2001/84/EC) (“droit de suite”)  
Global auction sales of EU living artists 2010 = €340m  
EU “heirs” market = €1bn

Arts Economics calculates that overall, only 18% of money collected goes to living artists!

- Example: term extension Sweden (1995 term extension by 20 years, accession required compliance with Directive 93/98/EEC)

Swedish collecting society data: increase in payments to dead composers from 2.4 percent of performing right royalties in 1995 to 14.1 percent in 2006

# 1. Independence and dignity? (cont.)

## Solutions

- Earnings are a function of contracts. Consider alternatives. Should “life plus” terms be available to corporations? (Aspirin)
- Remuneration rights & Moral rights  
= automatic term written into contracts (more valuable than exclusive, transferable rights).
- Collecting societies can be a mechanism for collective bargaining, not only towards users but also exploiters.



## 2. Copyright and the consumer

ESRC study 1996-99 (board level interviews, music)

Don't open up new market if it threatens you in the old.

- “No, no access, you are not going to take our repertoire, we are going to strangle this baby at birth.”

If you control content, the form of distribution does not matter (by technology, by law: ‘right to say NO’, WIPO 1996).

- “The removal company wants to buy the furniture store. This is ridiculous.”

## 2. Copyright and the consumer? (cont.)

### **The empirical reality**

- Strong evidence that for individuals, more unlawful downloading/sharing is associated with more actual sales (Kantar/Ofcom 2013; Watson, Fleming, Zizzo 2014). (This is consistent with an overall decline in physical markets).
- Arrival of streaming (subscription) services  
NL music (Poort & Weda 2014): “piracy” rates drop, from 38% (in 2008) to 27% of the population (in 2012).

## 2. Copyright and the consumer? (cont.)

### Copyright as Input and Output

- For User Generated Content (UCG), there is evidence that non-commercial engagement is associated with greater sales (Erickson 2013). There are other societal and cultural reasons (e.g. digital skills), why we may want active, rather than passive consumers in a digital world.
- For Research and Education, again, consumption is not passive. “Productive use”.

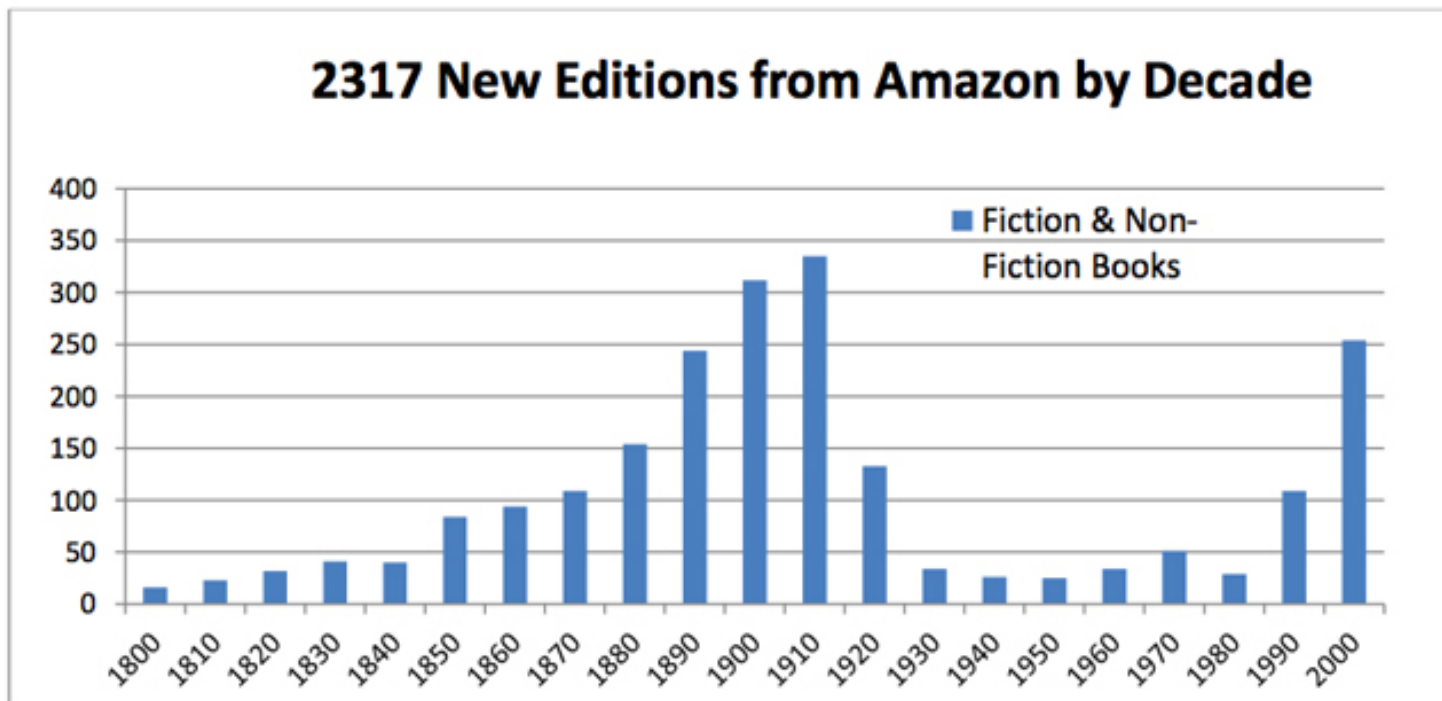
## 2. Copyright and the consumer? (cont.)

### **Solutions**

- Shift enforcement efforts from consumer to commercial services (“follow the money”).
- Make internal market work (remove territorial windowing).
- Exceptions: Permit use of copyright materials as input where it does not conflict with the underlying purpose of copyright.

# 3. Copyright and non-use

Double as many new books originally published in the 1890s are commercially available than from the 1950s (Heald 2013).



# 3. Copyright and non-use? (cont.)

## The empirical reality (all US data!)

- Only 2.3% of in-copyright books and 6.8% of in-copyright films released pre-1946 remain commercially available (Mulligan & Schultz 2002).
- Book Trade Almanac for 1872–1957: of 10,027 books published in the US in 1930, only 174 (1.7%) were still in print in 2001 (Landes and Posner 2003).
- Reissues of US sound recordings: random sample of 1521 records issued between 1890 and 1964, only 14 percent were available from rights owners (Brooks 2005).
- Is it going to get better digitally? Sample of books from the New York Times best seller list 1923-32: only 27% are available today as e-book (Heald 2014).

# 3. Copyright and non-use? (cont.)

## **Solutions** Use-it-or-lose-it (rights come with obligations)

- As in trade mark law, there needs to be a legal mechanism that releases unused works. (TM Directive Article 11: “A trade mark shall be liable to revocation if, within a continuous period of five years, it has not been put to genuine use (...)” (89/104/EEC, codified as 2008/95/EC).
- Living creators and artists (who typically are not the owners of their unused works) could be empowered to recover such works through reversion clauses.
- Technical issues can be solved: appropriate period after which use obligations arise, nature of use (“in sufficient quantity” says term extension directive), no formalities (prohibited under international law).

# 4. Evidence-based policy

## Example 1: “Summertime”

DIRECTIVE 2011/77/EU (term extension)

*(1) The following paragraph shall be added to Article 1:*

*‘7. The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not those persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the respective musical composition with words.’*

Music: George Gershwin (1898 – 1937):

+ 70 years = 2007

Text: Ira Gershwin? (1896 – 1983):

+ 70 years = 2053



# 4. Evidence-based policy

## Example 2: Copyright limitations at WIPO

WIPO Standing Committee on Copyright and Related Rights  
(SCCR)

- European Commission has been consulting on copyright reform in 2013/14, with clear signals that further development and harmonisation of education, research and library exceptions for the digital context was desirable.
- At the international level, the EU has blocked progress towards an instrument that would facilitate the transfer of information between libraries and archives across borders.

# Conclusions: Four inconvenient truths

1. **The independence and dignity of the artist**
  2. **The productive consumer**
  3. **Non-use**
  4. **Evidence-based policy**
- On many of the thorny issues, our knowledge is growing rapidly. I referred today to numerous findings of independent studies. Viewed together, they offer a compelling picture. Copyright law currently is skewed towards owners of large backcatalogues and estates, with many costly, and unnecessary consequences.
  - Any intervention must foster Europe's creative and artistic vibrancy. Choices will have to be made that do not please everybody. The Gershwin example shows that every intervention will serve some interests more than others.
  - If Europe wishes to recover its leadership of copyright policy, tinkering around the edges will not do.



# CREATE

Martin Kretschmer, Director CREATE

Professor of Intellectual Property Law, University of Glasgow

[www.create.ac.uk](http://www.create.ac.uk)



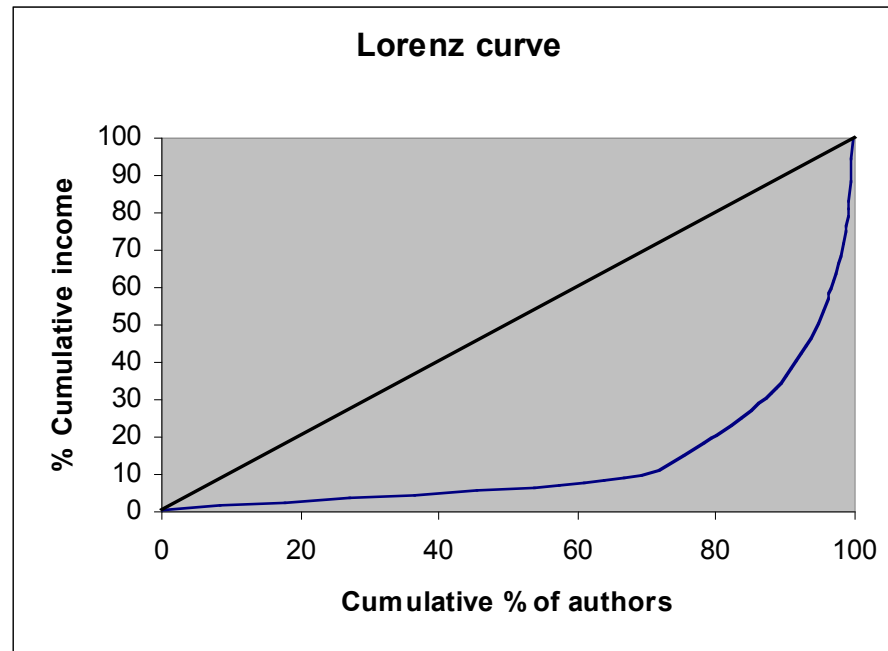
Arts & Humanities  
Research Council



Pioneering research  
and skills



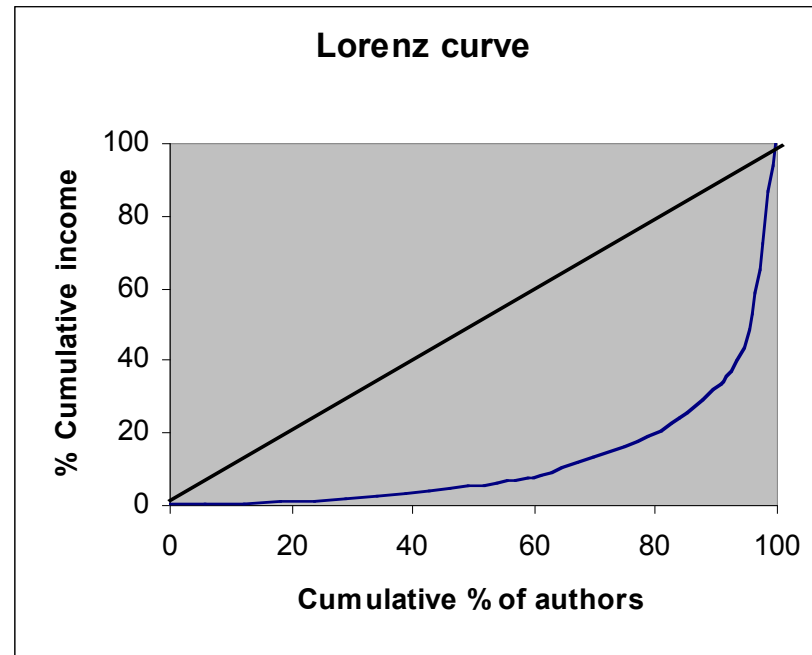
## APPENDIX – Germany: Annual earnings from self-employed writing (2001)



Source:  
Commissioned analysis  
of 24,436 tax payers  
(2001)  
Statistisches Bundesamt  
(federal office for  
statistics)

Mean earnings	<b>€17,306</b>
Median earnings	<b>€ 7,163</b>
Gini Coefficient	<b>0.83</b>

APPENDIX – Germany: Annual earnings from self-employed writing (2001)  
of those tax payers who earn 50% and more of their income from writing



Source:  
Commissioned analysis  
of 10,220 “main-  
income” self-employed  
tax payers (2001) –  
(sub-sample of previous  
figure) Statistisches  
Bundesamt (federal  
office for statistics)

Mean earnings	<b>€33,976</b>
Median earnings	<b>€10,375</b>
Gini Coefficient	<b>0.75</b>

Germany: Annual earnings (net) all  
employed (2004)

Mean earnings	<b>€31,157</b>
Median earnings	<b>€28,730</b>
Gini Coefficient	<b>0.31</b>