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## Copyright and Digital Art: Through the Looking Glass

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## **Abstract**

This chapter explores the interaction between copyright and everyday life of artists in the digital environment. It focuses on the role of copyright in the every day context of *a* specific creative activity: digital art practice. It draws upon findings from a qualitative empirical study consisting of first-hand accounts from digital artists on their perspective and practice on matters such as creation, dissemination and exploitation of their artworks. The chapter provides a flavour of the life that copyright law and policy take, in ways which contrast with their own purpose, because of the various connections and complexities between the digital artist and other actors in an artistic practice. It emphasises that understandings of ‘copyright in action’ in new creative activities in the digital environment, particularly through the creators’ perspective, can offer valuable insights for policy making.

Section I briefly introduces relevant policy discussions on copyright in United Kingdom. Section II contextualizes the empirical study and outlines the methodology employed. Section III presents some of the findings on the perceived role of copyright in digital artists’ creative practice, specifically the lack of belief in both the prevention of copying in the digital domain and in the usefulness of copyright law for creators. It illustrates how various actors influenced the artists’ understandings and decisions on the role of ‘copying’ and ‘copyright’ for their practice. Section IV provides concluding remarks.

## **Keywords**

Copyright, Copying, Rights, Copyright in action, Creativity, Creative practice, Art, Artist, Author, Creator, Digital Artist, Qualitative empirical study

## Copyright and Digital Art: Through the Looking Glass

- Smita Kheria\*

### I. Introduction

Digital technologies and information and communications systems, including the internet, have brought about revolutionary changes in the past century which have had a profound affect on the production, dissemination, exploitation and consumption of creative output and consequently posed considerable challenges, both conceptual and practical, to copyright law. The discussions in United Kingdom to adapt the copyright framework to these challenges have taken place in the context of assessment of the role of Intellectual Property in economic growth and innovation in the 'knowledge economy'. The importance of these challenges is reflected in the numerous policy discussions at domestic and regional level<sup>1</sup> and is captured in the following observation by the latest independent review of Intellectual Property: "In developing the UK's IP framework to maximise economic growth and innovation, copyright presents our biggest challenge, but also our biggest opportunity."<sup>2</sup>

UK legislation does not spell out a utilitarian, or indeed any particular, purpose for granting copyright protection but there is enough evidence to suggest that the central purpose of copyright is seen to be stimulation and incentivisation of creative activity.<sup>3</sup> The nature and strength of

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<sup>1</sup> Her Majesty's Government United Kingdom (HM Government), *Consultation on proposals to change the UK's copyright system* (Intellectual Property Office, December 2011); HM Government, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (Intellectual Property Office, August 2011); Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (Intellectual Property Office, May 2011); HM Government, *Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions* (Intellectual Property Office, December 2009); Strategic Advisory Board for Intellectual Property (SABIP), *Strategic Priorities for Copyright* (Intellectual Property Office, March 2009); Department for Culture, Media and Sport (DCMS), *Creative Britain: New Talents for the New Economy* (February, 2008); HM Government, *Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions* (Intellectual Property Office, January 2008); Andrew Gowers, *Gowers Review of Intellectual Property* (HMSO, December 2006); For the discussion in the European Union see Commission of the European Communities, *Green Paper on the online distribution of audiovisual works in the European Union* (COM(2011) 427 final, July 2011); Commission of the European Communities, *Communication on Copyright in the Knowledge Economy* (COM(2009) 532 final, October 2009); Commission of the European Communities, *Green Paper on Copyright in the Knowledge Economy* (COM(2008) 466/3, July 2008)

<sup>2</sup> Hargreaves, *Digital Opportunity*, p.26

<sup>3</sup> Hargreaves, *Digital Opportunity*, p.8; SABIP, *Strategic Priorities for Copyright*, p.11

copyright protection, both in the digital era and the pre-digital era, further underlines the policy assumption that copyright protection is the key to encouraging creativity. Even before the advent of the digital environment, copyright laws were considered to have been extended, strengthened and lengthened to the extent that a rebalance was required.<sup>4</sup> However, pursuant to legislative changes resulting from the onslaught of digital technologies, copyright protection is stronger than ever before.

Some examples reflecting this strength are: successful legal actions by the content industries against both online service providers which facilitate unlawful file sharing<sup>5</sup> as well as against Internet access providers to ensure blocking of access to such online service providers<sup>6</sup>; continuing efforts to provide further legal measures to combat online piracy, including creating obligations for Internet access providers;<sup>7</sup> and, provisions on the legal protection against circumvention of technological protection measures.<sup>8</sup> These developments have been criticized for, amongst other reasons, reflecting the commercial interests of entertainment industries, giving unprecedented control to right holders and jeopardizing the potential for future innovation and creativity, especially those cultural practices which are based on drawing upon existing data, information and works and remaking or remixing them. Despite acknowledgement of some of these criticisms and concerns, policy discussions continue to reflect the presumption that copyright protection is both necessary for, and useful in, capturing value from the creative industries in the new 'knowledge economy.'

Two specific concerns that have been recently observed in policy discussions form the backdrop for this chapter: the necessity for formulation of UK copyright policy on the basis of evidence;<sup>9</sup>

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<sup>4</sup> Hugh Laddie, "Copyright: Over-Strength, Over-Regulated, Over-Rated?," *European Intellectual Property Review* 18, no. 5 (1996): 253; Norma Dawson, "Copyright in the European Union - Plundering the Public Domain," *Northern Ireland Legal Quarterly* 45, no. 2 (1994): 193

<sup>5</sup> E.g. *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch)

<sup>6</sup> E.g. *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2011] EWHC 1981 (Ch)

<sup>7</sup> Digital Economy Act 2010 (c.24, 2010); DCMS, *Next Steps for implementation of the Digital Economy Act* (August 2011); Anne Barron, "'Graduated Response' à l'Anglaise: Online Copyright Infringement and the Digital Economy Act 2010," *Journal of Media Law* 3, no.2 (2011): 305; Benjamin Farrand, "The Digital Economy Act 2010 - a cause for celebration, or a cause for concern?," *European Intellectual Property Review* 32, no. 10 (2010): 536

<sup>8</sup> ss.296-296ZF Copyright, Designs and Patents Act 1988 (c.48, 1988); Christopher May, *Digital rights management The problem of expanding ownership rights* (Oxford: Chandos, 2007)

<sup>9</sup> Hargreaves, *Digital Opportunity*, p.1

and, a consideration of the impact of the digital environment on the role of copyright for *different types of creativity*.<sup>10</sup>

Empirical research on all aspects of copyright in the UK is strongly needed. Yet, until recently, both the discourse on intellectual property rights generally, and copyright in particular, has failed to attract sufficient empirical attention. IP scholarship has been criticized in academic commentaries for being mostly theoretical, abstract and doctrinal.<sup>11</sup> Since utilitarian justifications appear to underpin UK's copyright policy, it follows that there should be continuous empirical examination of the benefits and harms of the current system.<sup>12</sup> An assessment of whether the copyright framework as the 'means' is achieving the 'end' of incentivisation, for emerging types of creative activities, becomes even more important in a new and rapidly changing environment. And in light of the growing policy debate on the role of copyright, the following questions have become significant: Is copyright encouraging creativity or inhibiting it? In particular, is copyright encouraging or inhibiting the creation and dissemination of new creative works?

The recent emphasis on evidence-based policy making in the UK has resulted in increased efforts to collate existing empirical research as well as develop research programs to generate further evidence for IP policy.<sup>13</sup> However, the role of IP in everyday social contexts for different types of creative activities has been insufficiently addressed so far. For example, the exploration of new business models have found particular favour as being one of the possible solutions in adapting to the continuously evolving digital environment<sup>14</sup> but the exact role played by

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<sup>10</sup> SABIP, *Strategic Priorities for Copyright*, p.11 [own emphasis added]

<sup>11</sup> William T. Gallagher, ed., *Intellectual Property* (Aldershot: Ashgate, 2007) p.xi; Rosemary J. Coombe, "Commodity Culture, Private Censorship, Branded Environments, and Global Trade Politics: Intellectual Property as a Topic of Law and Society Research," in *The Blackwell Companion to Law and Society*, ed. Austin Sarat (Oxford: Blackwell, 2004) p.369

<sup>12</sup> James Boyle, while reviewing existing empirical evidence on copyright, has presented cogent arguments for continued use of empirical evidence in intellectual property policymaking. He notes that: "We should make our policy based on empirical evidence of its likely effects and there should be a formal requirement of empirical reconsideration of those policies after they have been implemented to see if they are working." James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (London: Yale University Press, 2008) p.206

<sup>13</sup> Intellectual Property Office (IPO), "IP Research," <http://www.ipo.gov.uk/pro-ipresearch.htm> (accessed July 12, 2012)

<sup>14</sup> Hargreaves, *Digital Opportunity*; IPO, (c) *the Way Ahead: A Strategy for Copyright in the Digital Age* (IPO, October 2009); DCMS, *Digital Britain final report* (June, 2009)

copyright in the existing and emerging business models,<sup>15</sup> across the various creative sectors, remains unclear. Similarly, the position of creators as one of the stakeholders with an interest in the nature of copyright policy has been explicitly acknowledged.<sup>16</sup> Yet, empirical attention on the role of copyright in the day to day creative practice of creators remains minimal.

This chapter focuses on the role of copyright in the every day context of *a* specific creative activity: digital art practice. It aims to go ‘through the looking glass’ in a digital artist’s creative practice to explore the wonderland of copyright in action. The chapter draws upon findings from a qualitative empirical study consisting of first-hand accounts from digital artists on their perspective and practice on matters such as creation, dissemination and exploitation of their artworks. It provides a flavour of the life that copyright law and policy take, in ways which in contrast with their own purpose, because of the various connections and complexities between the digital artist and other actors in an artistic practice. It emphasises that understandings of ‘copyright in action’ in new creative activities in the digital environment, particularly through the creators’ perspective, can offer valuable insights for policy making.

Section II contextualizes the empirical study and outlines the methodology employed. Section III presents some of the findings on the perceived role of copyright in digital artists’ creative practice, specifically the lack of belief in both the prevention of copying in the digital domain and in the usefulness of copyright law for creators. It illustrates how various actors influenced the artists’ understandings and decisions on the role of ‘copying’ and ‘copyright’ for their practice. Section IV provides concluding remarks.

## **II. Copyright and Digital Art: A Qualitative Empirical Study**

The objective of the qualitative empirical study (hereafter, the study) was to gain an understanding of the interaction of copyright with the everyday life of digital artists: illuminate what law means in the local context of their creative practice; and, explore the subtle processes in each creator’s practice in detail to evaluate how current law and policy play out in action.

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<sup>15</sup> See a recent report commissioned by the IPO which looks at business models in three creative sectors. Nicola Searle, *Changing Business Models in the Creative Industries: The cases of Television, Computer Games and Music* (IPO, October 2011)

<sup>16</sup> SABIP, *Strategic Priorities for Copyright*, p.8; IPO, *(c) the Future: Developing a Copyright Agenda for the 21st Century* (IPO, December 2008), p.5

Original first-hand accounts of the perspective and practice of digital artists on matters such as creation, dissemination and exploitation of their artworks were obtained and analysed.

### A. Socio-legal Studies

The study took a socio-legal approach for studying the interaction of copyright with the everyday life of digital artists. The role of IP in everyday social contexts for different types of creative activities has not been sufficiently addressed in the copyright discourse in United Kingdom. Socio-legal research on ‘copyright in action’ can make a valuable contribution in addressing this gap. Socio-legal studies facilitates inter-disciplinary examination of legal phenomena<sup>17</sup> and the ‘context within which law exists, be that a sociological, historical, economic, geographical or other context.’<sup>18</sup> As such, it is very suitable for examining what copyright ‘law does’ rather than what it is presumed to do:<sup>19</sup> how copyright protection actually interacts with the everyday practice of various creators and user-creators; how it impacts upon the interaction between different groups of stakeholders; how the subjective interpretation, meanings, and experiences by these stakeholders on the application of copyright in their practice shapes the contours of their practice.

Further, copyright is essentially a private right and not only can there be many sources of norms that influence the interaction of copyright and other factors in a creative practice, such ‘copynorms’ can also explain the variance between presence or absence of the operation of copyright law.<sup>20</sup> For example, the study of norms at play in the creative activities of jam-bands,<sup>21</sup> chefs,<sup>22</sup> stand-up comedians<sup>23</sup> and magicians<sup>24</sup> have provided insights on the value of prevailing

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<sup>17</sup> “The term ‘legal phenomenon’ seems to capture how we encounter law regularly in social life, often in dealing with documents such as tenancy agreements, employment contracts or insurance policies, or the liability notices on consumer products.” Max Travers, *Understanding Law and Society* (London: Routledge-Cavendish, 2009) p.5

<sup>18</sup> Sally Wheeler and Phil Thomas, “Socio-Legal Studies,” in *Law's Future(s)*, ed. David Hayton (Oxford: Hart, 2000) p.271

<sup>19</sup> Susan S. Silbey, “Law and Society Movement,” in *Legal Systems of the World: A Political, Social and Cultural Encyclopaedia – Vol II*, ed. Herbert M. Kritzer (Santa Barbara: ABC CLIO, 2002) p.860

<sup>20</sup> Mark F. Schultz, “Copynorms: Copyright Law and Social Norms,” in *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, ed. Peter K. Yu (Westport: Praeger Publishers, 2007)

<sup>21</sup> Mark F. Schultz, “Fear and Norms and Rock & Roll: What Jambands can teach about persuading people to comply with Copyright Law,” *Berkeley Technology Law Journal* 21 (2006): 651

<sup>22</sup> Christopher J. Buccafusco, “On the Legal Consequences of Sauces: Should Thomas Keller's Recipes be per se copyrightable,” *Cardozo Arts & Entertainment Law Journal* 24 (2007): 1121

<sup>23</sup> Dotan Oliar and Christopher Sprigman, “There’s No Free Laugh (anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy,” *Virginia Law Review* 94 (2008): 1787

norms against actual or potential copyright protection in incentivisation of those activities. Socio-legal research evaluating the interaction between copyright and the day to day practice of stakeholders can assist in gaining an understanding of such sources of norms that may be at play and as such contribute to more fully understanding the actual role of copyright in different areas of creative activities in the UK knowledge economy.

The study was carried out by employing grounded theory as the methodology to obtain, examine, and assess original qualitative data from the creators of digital art. Grounded theory originated in the works of Barney Glaser and Anselm Strauss<sup>25</sup> and ‘it is an approach to research that was developed in response to concerns over the predominance of quantitative methods in social sciences and the tendency for research to be undertaken to test existing grand theories.’<sup>26</sup> It involves an inductive process where theory is ‘derived from data, systematically gathered and analyzed through the research process’ and ‘in this method, data collection, analysis, and eventual theory stand in close relationship to one another.’<sup>27</sup> Grounded theory was employed to achieve the research aims of gaining and analysing the perspective of the artists in the following ways: to select creators and obtain rich data from them on their creative practice so far as it relates to copyright; to identify themes which show presence or absence of gaps between ‘copyright in books’ and ‘copyright in action’; to develop theory from such gaps which can be then co-related with existing copyright discourse.

Being qualitative in nature, the study was exploratory rather than statistical<sup>28</sup> and gap finding was one aspect of it. As such, it examined the discrepancies between copyright law and its aims on the one hand and the consequences of its interaction with a digital artist’s creative practice on other. An objection to ‘gap studies’ (gaps between law in books and law in action) is that they

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<sup>24</sup> Jacob Loshin, “Secrets Revealed: Protecting Magicians’ Intellectual Property without Law,” in *Law and Magic: A Collection of Essays*, ed. Christine A. Corcos (Durham: Carolina Academic Press, 2010)

<sup>25</sup> Barney G. Glaser and Anselm L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Chicago: Aldine Publishing, 1967); Barney G. Glaser, *Theoretical Sensitivity: Advances in the Methodology of Grounded Theory* (California.: Sociology Press, 1978)

<sup>26</sup> Jamie Harding, "Grounded Theory," in *The Sage Dictionary of Social Research Methods*, ed. Victor Jupp (London: Sage Publications, 2006) p.131

<sup>27</sup> Anselm L. Strauss and Juliet M. Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (London: Sage Publications, 1998) p.12

<sup>28</sup> The findings from the study were not designed to be used for drawing general inferences for all types of activities covered by copyright nor taken to be applicable to all types of artists. Indeed, even within the specific art practices included in the study, it cannot be said that there is always one artist “voice”.

tend towards instrumentalism: their primary focus is on legal effectiveness and they are closely related to a view that accepts laws to be capable of social change.<sup>29</sup> Consequently, studying ‘copyright in action’ could be argued to be simply ‘legal effectiveness research’ because it would explore the presence or absence of copyright’s effects or disjunctions in the artists’ creative practice.

It is admitted that the study privileged law in studying everyday life of creators as its primary concern was to tell a story about copyright law and policy.<sup>30</sup> Yet it went beyond being just ‘legal effectiveness’ research<sup>31</sup> as it was designed to focus also on studying law and policy’s constitutive effects: seeing ‘the links between law and society at the level of networks of legal practices, on the one hand, and clusters of beliefs and systems of meaning, on the other.’<sup>32</sup> In following the constitutive approach,<sup>33</sup> the study avoided presuming that law governs society from above or outside in an instrumental fashion but saw copyright law as part of social life.<sup>34</sup> Instead, it focussed on the creators’ own meanings and images of the law that they internalize in their creative practice. It is these meanings that the study aimed to gain an insight of and adduce what copyright law and policy implied for those whose creative practice it aimed to govern.<sup>35</sup>

## B. The premise: Digital Art

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<sup>29</sup> Austin Sarat, "Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition," *Legal Studies Forum* IX, no.1 (1985): 23

<sup>30</sup> ‘A “law-first” paradigm constructs law as the central character of *sociolegal* scholarship. Even those works that abandon the *law-first* paradigm as a research strategy nonetheless attempt in the end to tell a story about law.’ Susan S. Silbey, "‘Let Them Eat Cake’: Globalization, Postmodern Colonialism, and the Possibilities of Justice," *Law & Society Review* 31, no.2 (1997): 207, p.229

<sup>31</sup> It is worth noting here that socio-legal scholarship in the UK did not engage with the law and society division as strongly as in the U.S., see Ron Levi and Mariana Valverde, "Studying Law by Association: Bruno Latour Goes to the Conseil d’État," *Law & Social Inquiry* 33, no. 3 (2008): 805; Indeed it is difficult to define or mention socio-legal studies without pointing out the importance of interdisciplinarity, involving studying law by deploying a combination of theories, methodologies and methods. Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (London: Pearson Education Limited, 2007) p.133

<sup>32</sup> Austin Sarat and Thomas R. Kearns, "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life," in *Law in Everyday Life*, eds. Austin Sarat and Thomas R. Kearns (Michigan: University of Michigan Press, 1995) p.28

<sup>33</sup> It has been noted that both the instrumentalist and constitutive perspectives can be traced back to the legal realism movement and the distinction between them is more a matter of degree, see Sarat and Kearns, *Beyond the Great Divide*

<sup>34</sup> Sarat, *Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition*, p.31

<sup>35</sup> “Meaning is perhaps the key word in the vocabulary of those who speak about law in constitutive terms.” Sarat and Kearns, *Beyond the Great Divide*, p.30 [original emphasis added]

The digital environment enabled both the conversion and creation of analogue works like books, photograph, film and music using digital technologies as a tool as well as sharing of such content in digital form. The facilities for such creation and dissemination also became available to a bigger range of the population than ever before. However, content sharing is only one of the many opportunities brought by the digital environment. It opened up unprecedented opportunities for creation and representation of information in new forms that cannot exist in analogue form and facilitated their dissemination and experience in very diverse contexts. The beneficiaries of these opportunities<sup>36</sup> have been varied and include, amongst others, citizen journalists and bloggers, users of massively multiplayer online role-playing games, creators of remixes, mashups and fan art as well new media artists.

The chosen premise for the study was one form of new media art practice: digital art. Digital art as a premise provided not only a good and diverse body of new creative works that employ digital technologies and but provided an interesting premise where digital technologies and contemporary art philosophy and practices come together to not just exacerbate some of the general problems with copyright law in the digital environment but also offered an opportunity to study a marginalized group of creators.

Digital art can be broadly defined as any art work that can be delivered digitally as strings of 1s and 0s and so, technically, digital art could mean any artistic expression created using the digital medium. However, for the purposes of the study, digital art was defined as ‘digital technology reliant’ art<sup>37</sup> in the sense of art that employed such technologies as a medium and particularly reflected on the qualities of the medium. The following distinction by Christiane Paul was adopted:

“One of the basic but crucial distinctions made here is that between art that uses digital technologies as a tool for the creation of traditional art objects – such as photograph, print, sculpture or music – and art that employs these technologies as its very own medium, being produced, stored and presented exclusively in the digital format and

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<sup>36</sup> For a summary of these opportunities see Michael Geist, *Our own Creative Land: Cultural Monopoly & the Trouble with Copyright*, (Toronto: Hart House, 2006) Ch.1

<sup>37</sup> It can also be referred to as ‘born-digital’ works of art. See Richard Rinehart, *Nailing Down Bits: Digital Art and Intellectual Property* (Canadian Heritage Information Network, 2006)

making use of its interactive or participatory features. While both of these kinds of art share some of the inherent characteristics of digital technology, they are often distinctly different in their manifestations and aesthetics. These two broad categories are not meant as a definitive classification but rather as a preliminary diagram of a territory that is *by its nature extremely hybrid*.”<sup>38</sup>

This narrower construction of digital art allowed focus on issues for copyright that stem from both use of new technologies as well as contemporary art philosophy and practices.<sup>39</sup>

The digital environment stretches the boundaries of both what is possible with digital technologies as well as what is considered artistic. Art which uses digital technologies as a medium, involving and employing its many features like appropriation, combination and manipulation of different art forms and interactivity, presents multiple and extremely hybrid manifestations.<sup>40</sup> For example, it has involved exploration of new capabilities of this medium like ‘interactivity, multiple streams of media, and hypermedia to pursue goals such as deconstruction, personal expression and documentary.’<sup>41</sup> As such, it allowed assessment of the role of copyright in the creation, dissemination and exploitation of ‘new and emerging’ creative activities as opposed to those which duplicate traditional art works in a different medium. Contemporary art practices already illustrate the conflict between copyright and new creative practices and question both the legitimacy of copyright protection as well its notions like originality and authorship.<sup>42</sup> However, digital art provided a premise which advances and exaggerates these questions because it comprises of part ‘original’ elements, the sort of originality that is exalted by copyright; and, part ‘remade’ elements, the sort of use that is considered infringement under copyright.

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<sup>38</sup> Christiane Paul, *Digital Art*, (London: Thames & Hudson, 2003) p.8 [own emphasis added]

<sup>39</sup> See generally David Cottington, *Modern Art: A very Short Introduction* (Oxford: Oxford University Press, 2005), Ch.5

<sup>40</sup> “Art that explores technological and scientific frontiers is an act of relevance not only to a high-brow niche in a segregated corner of our culture. Like research, it asks questions about the possibilities and implications of technological innovation. It often explores different inquiry pathways, conceptual frameworks, and cultural associations than those investigated by scientists and engineers.” Stephen Wilson, *Information Arts: Intersections of Art, Science, and Technology* (Cambridge, MA: MIT Press, 2002) p.3

<sup>41</sup> Wilson, *Information Arts*, p.689

<sup>42</sup> For a collection of essays, covering many disciplinary approaches, on the limits to copyright protection of analogue works of contemporary art and the potential restrictions imposed by such protection on contemporary art practices, see Daniel McClean and Karsten Schubert, eds., *Dear Images: Art, Copyright and Culture*, (London: Ridinghouse, 2002)

Digital art and artists with digital art as their practice also presented themselves as a marginalized group in policy discussions on creative activities in the digital environment. “Creative industries” have been viewed as key economic players by the government in the UK. They are defined as ‘those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property,’ although the specific categories of practices that are seen to fall within this definition have changed over time.<sup>43</sup> While the origin of the term “creative industries” and its association with intellectual property and cultural policy are itself highly questionable,<sup>44</sup> the key problem for the present context is that neither the categorisations explicitly include digital arts nor is the definition capable of accommodating digital artists.<sup>45</sup>

For example, digital artists tend to be independent creators engaged in new experimental practices and while they may be generating intellectual property, they may not be exploiting them or be particularly profit-driven. Yet, new and independent practices which push the boundaries of art and culture, where the creator(s) may play multiple roles and their practice operates effectively like a small business, should be seen an essential part of the creative production in the economy.<sup>46</sup> Unsurprisingly, the implications of copyright for new and emerging experimental practices like digital art have escaped attention in policy discussions. The general consultations on IP have evoked little discussion in this regard and have not gone beyond cursory observations of transformative possibilities of existing content like video parodies and

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<sup>43</sup> DCMS, *Creative Industries Mapping Document* (March, 2001) p.5; DCMS, *Creative Industries Mapping Document* (1998); For the latest position see, DCMS, "Creative Industries," [http://www.culture.gov.uk/what\\_we\\_do/creative\\_industries/default.aspx](http://www.culture.gov.uk/what_we_do/creative_industries/default.aspx); The European Commission has also noted the economic potential of the cultural and creative industries for Europe but defined them differently. Commission of the European Communities, *Green Paper on Unlocking the potential of cultural and creative industries*, (COM (2010) 183, April 2010)

<sup>44</sup> Philip Schlesinger and Charlotte Waelde, “Copyright and cultural work: an exploration,” *Innovation: The European Journal of Social Science Research* 25, no.1 (2012): 11

<sup>45</sup> The term ‘creative industries’, although widely used, is problematic because neither is creativity confined to them only nor can sometimes the product resulting from these industries can be considered creative. William J. Mitchell, Alan S. Inouye and Marjory S. Blumenthal, *Beyond Productivity: Information Technology, Innovation, and Creativity*, (Washington, D.C.: National Academies Press, 2003) p.19; Similar difficulties in defining the term scientifically, because of its complex nature, have been acknowledged outside academic discourse too. DCMS, *Creative Industries Mapping Document* 2001, Part 1

<sup>46</sup> Mitchell, Inouye and Blumenthal, *Beyond Productivity*, pp. 20-23

mashups.<sup>47</sup> Experimental practices like digital art could be seen as clearly established and no more peripheral to mainstream art world.<sup>48</sup> Yet at the time of the study, they were primarily undertaken by creators individually or as artistic groups who were not organized through formal representative bodies for their legal interests, meaning that their representation or voice in the process of policy making remained limited.

As creative practices incorporating digital technologies become more influential and also move from the domain of “artistic practice” alone to become part of general culture, they present a strong case for evaluation. The choice of digital art as a premise allowed the study to put the spotlight on one of the most creative practices that digital technologies enable:<sup>49</sup> art practice that not only employs the digital medium but also aims to stretch it beyond contemporary art practices in the analogue world.

### C. Research methods

First, in line with the qualitative nature of the study and the adoption of grounded theory, purposive sampling was employed for the *sampling of the artists*. The purposive sampling criteria was designed to select self identified artists, who were based in the UK or Ireland for purpose of their creative practice, and whose practice incorporated digital art for at least 2 years. A master list of the target population was developed by identifying artist profiles through their web presence on key digital art websites and perusing their profiles and applying the purposive sampling criteria.<sup>50</sup> Second, random sampling was employed on this master list for *sampling of interviewees to be contacted* for the study. 55 artists from this list were contacted and over 35

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<sup>47</sup> E.g. Hargreaves, *Digital Opportunity*, pp.27, 49-50; Gowers, *Gowers Review of Intellectual Property*, pp.67-68

<sup>48</sup> Paul, *Digital Art*, pp.7, 23

<sup>49</sup> In the same vein as Lawrence Lessig puts the spotlight on the remixing culture and describes it as “the most interesting, the very best of what these new technologies make possible.” Lawrence Lessig, *Remix: Making Art and Commerce thrive in the Hybrid Economy*, (London: Bloomsbury, 2008) p.18

<sup>50</sup> Key websites were identified and collated through many sources from books on new media art and digital art, artists’ recommendations as well as web searches, and included dedicated online portals for new media art; websites for international competitions and art festivals, including or dedicated to, new media; websites for museums, including their online art collection; and directories of art organizations which promote new media art. Most artists maintained a comprehensive web profile through these key sites as well as their own stand alone website and included biographical data, details of their art works and projects, including links to the works that had been disseminated online and sometimes extensive documentation of those which could not be disseminated as such. Over 85 such websites were trawled during the entire field work and hundreds of profiles of artists were perused against the sampling criteria below.

initial positive responses were received. It led to 21 in-depth interviews, conducted in 2007 and 2008, that were used for the study.

The interviews were semi-formal, semi-structured but guided conversations.<sup>51</sup> An interview topic guide was used with the aim of keeping the interview remains 'standardized' in outline but giving the interviewees an opportunity to convey their stories so far as they related, quite broadly, to copyright law and policy.<sup>52</sup> The topic guide had three key parts: first, general questions about the interviewees creative practice (background, origin, motivations, types of output); second, questions on the workings of their day to day practice (creation, co-creation, appropriation, dissemination, licensing and monetization); third, more specific questions relating to 'copyright in action' in their practice (property, authorship, economic rights, moral rights). Interviews were recorded and transcribed for analysis.

#### D. Informants: Digital Artists

There were only 4 female interviewees compared to 17 male interviewees. Although many of the interviewees worked in collaborative projects on an ad hoc basis, two of the female interviewees worked in a permanent group with a male counterpart and there were also two male interviewees who similarly worked with a female counterpart. Both the age group and the years of practice<sup>53</sup> amongst the interviewees showed a wide range. The majority of artists, that is 13, came from the 31-40 age bracket (Interviewee nos. 3-15) while 6 artists were between 41-55 years (Interviewee nos.16-21) and only 2 were under 30 (Interviewee nos. 1-2).<sup>54</sup> 12 artists had between 8 – 15 years of practice; 6 artists had up to 8 years of practice; and 3 artists had from 15 to over 25 years of practice.

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<sup>51</sup> See Robert G. Burgess, "The Unstructured Interview as a Conversation," in *Field Research: A Sourcebook and Field Manual*, ed. Robert G. Burgess (London: Routledge, 1991)

<sup>52</sup> See Jaber F. Gubrium and James A. Holstein, "From the Individual Interview to the Interview Society," in *Postmodern Interviewing*, eds. Jaber F. Gubrium and James A. Holstein (London: Sage Publications, 2003), in particular pp.34-37 discussing Mishler's approach

<sup>53</sup> Based on exhibition, display or making available to public of art works as reflected in their bios or curriculum vitas made available on their website or through the interview.

<sup>54</sup> These interviewee numbers will be used when quoting from the interviews and such quotations remain direct transcriptions except for changes made for clarity and to maintain anonymity of interviewees.

It is important to note that the focus of the study was not every manifestation of digital art but only those that formed a prominent part of the practice of the artists interviewed for the research. Such forms of digital art were: digital writing,<sup>55</sup> internet art and nomadic works,<sup>56</sup> software art,<sup>57</sup> digital installations and networked performance.<sup>58</sup> The interviewees included some leading and many well known artists whose works have been displayed internationally, apart from on their own personal or stand alone websites, in venues like Museum of Modern Art SF,<sup>59</sup> Tate Britain<sup>60</sup> & Tate Modern London,<sup>61</sup> ZKM Centre Karlsruhe,<sup>62</sup> Irish Museum of Contemporary Art Dublin,<sup>63</sup> Digital Art Museum Berlin,<sup>64</sup> Centre de Georges Pompidou Paris,<sup>65</sup> Trans-Media-Akademie Hellaerau,<sup>66</sup> Walker Art Centre Minneapolis,<sup>67</sup> Museum of Contemporary Art Sydney;<sup>68</sup> on dedicated online portals for digital art like Stunned.org,<sup>69</sup> Turbulence.org,<sup>70</sup> soundtoys.net;<sup>71</sup> and international festivals either dedicated to or including new media like Siggraph,<sup>72</sup> Split,<sup>73</sup> FILE,<sup>74</sup> CYNETart,<sup>75</sup> Cybersonica,<sup>76</sup> Intermediale,<sup>77</sup> Transmediale.<sup>78</sup> Some of their works had also been written about in books on development of digital art.

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<sup>55</sup> It is known by many names like hypertext writing, new media writing and electronic writing. For example, Electronic literature can be defined as ‘works with important literary aspects that take advantage of the capabilities and contexts provided by the stand-alone or networked computer.’ Electronic Literature Organization, "What is Electronic Literature?", <http://www.eliterature.org/about/> (accessed July 12, 2012)

<sup>56</sup> See Rachel Greene, *Internet Art* (London: Thames & Hudson, 2004) pp.31-32

<sup>57</sup> See Paul, *Digital Art* p.124

<sup>58</sup> See Steve Dixon, *Digital Performance: A History of New Media in Theater, Dance, Performance Art, and Installation* (Cambridge, Mass.: MIT Press, 2007) pp.3, 512

<sup>59</sup> <http://www.sfmoma.org/> (accessed July 12, 2012)

<sup>60</sup> <http://www.tate.org.uk/britain/> (accessed July 12, 2012)

<sup>61</sup> <http://www.tate.org.uk/modern/> (accessed July 12, 2012)

<sup>62</sup> <http://www.zkm.de/> (accessed July 12, 2012)

<sup>63</sup> <http://www.imma.ie/en/index.htm> (accessed July 12, 2012)

<sup>64</sup> <http://dam.org> (accessed July 12, 2012)

<sup>65</sup> <http://www.centrepompidou.fr/> (accessed July 12, 2012)

<sup>66</sup> <http://t-m-a.de/> (accessed July 12, 2012)

<sup>67</sup> <http://www.walkerart.org/index.wac> (accessed July 12, 2012)

<sup>68</sup> <http://www.mca.com.au/> (accessed July 12, 2012)

<sup>69</sup> <http://www.stunned.org/> (accessed July 12, 2012)

<sup>70</sup> <http://www.turbulence.org/> (accessed July 12, 2012)

<sup>71</sup> <http://www.soundtoys.net/> (accessed July 12, 2012)

<sup>72</sup> <http://www.siggraph.org/> (accessed July 12, 2012)

<sup>73</sup> <http://www.splitfilmfestival.hr/> (accessed July 12, 2012)

<sup>74</sup> <http://www.file.org.br/> (accessed July 12, 2012)

<sup>75</sup> <http://t-m-a.de/cynetart> (accessed July 12, 2012)

<sup>76</sup> [www.cybersonica.org/](http://www.cybersonica.org/) (accessed July 12, 2012)

<sup>77</sup> <http://www.intermediale.com/> (accessed July 12, 2012)

<sup>78</sup> <http://www.transmediale.de/> (accessed July 12, 2012)

The role and influence of research universities and centres in supporting the production of digital art<sup>79</sup> was also clearly reflected in the connection of the majority of interviewees with higher educational institutions, in particular, the research centres located therein. Seventeen interviewees, along with having an independent art practice, were affiliated with an academic department of a United Kingdom or an Irish higher education institution in different capacities, ranging from doctoral candidates, research fellows and artists in residence to visiting lecturers, lecturers, professors, directors and heads of units in either a part-time or a full-time capacity. Only two interviewees (Interviewee 12 and 18) had no association or affiliation with any institution or organization at the time of interviewing although both of them had been affiliated in one of the above capacities in the past. The remaining two interviewees (Interviewee 21 and 14), while also maintaining an independent art practice, were involved in the entertainment side of the creative industries at a production level and with a government agency for the arts at an administrative level respectively.

The interviewees, both digital natives<sup>80</sup> and digital immigrants,<sup>81</sup> associated the creative process closely with the exploration of the various potentials brought about by digital technologies. While such potentials included basic technical capabilities brought by the digital environment like ease of creation and copying in a quicker and cost effective way along with a greater capacity for dissemination directly to new audiences. However, the interviewees' real attraction to the digital environment also lay in exploring technical abilities, over and above such basic features, for their creative practice i.e. to use of features inherent to the digital medium that allowed carrying out processes which may not be possible in an analogue medium; as well as the ability to expand on their earlier artistic disciplines and practices. The possibilities offered by computer programming and in particular its generative capability, flexibility, ability to combine multiple media, appropriation and manipulation of data in real time, and capacity for weaving in variable levels of user interactivity were all relevant potentials.

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<sup>79</sup> Paul, *Digital Art*, p.8

<sup>80</sup> The term is used here to mean those artists who have been 'native speakers' of the digital language from the start of their creative practice. See Marc Prensky, "Digital Natives, Digital Immigrants" *On the Horizon* 9, no.5 (2001): 1, where the term is used for students who grew up in the digital world and are native speakers of the digital language.

<sup>81</sup> The term is used here to mean those artists who did not start their art practice with digital technologies but have adopted it subsequently; see Prensky, *Digital Natives, Digital Immigrants*, where the term is used to describe those educators who were not born into the digital world but have adopted aspects of new technologies.

### E. Outcome

The overall conclusion from the study was that both copyright law and policy did not sit easily with either the artistic aims of the interviewees nor their actual practice. There was no evidence to suggest that copyright protection encouraged or promoted a new 'creative' activity like digital art practice and indeed was resisted in the actual day to day practice. The findings echoed the following observation on copyright law by an academic commentator: "The general purpose of this amorphous body of law is to encourage innovation, creativity and the spread of knowledge, but *there is little equation between aspiration and achievement.*"<sup>82</sup>

The study helped in identifying several gaps which illustrated how copyright law and policy were disabled in their everyday practice. For example, legislative requirements for copyright protection like categorization and fixation were both challenged by and ran counter to the very potentials of digital technologies that the interviewees found attractive. This resulted in the legal requirements for protection being not just inactive but also disenfranchised. Similarly, both the scope of economic rights and moral rights, as well exceptions and limitations under copyright law were found not to coalesce with the type and strength of protection and freedoms perceived to be necessary by the interviewees for their artistic practice.

In addition, the findings from the study were also marked by an absence of equation between the aspirations of copyright policy and the actions in the interviewees' art practice.

The role of copyright as incentivising creative activities is enshrined in current copyright policy. Yet the two key presumptions underlying the incentive argument - that artists would not create digital artworks without the economic incentive afforded by copyright and that exclusive property rights under copyright do in fact encourage production of digital artworks - were not reflected in the interviewees' creative practice. Copyright was not found to have any independent ability to incentivize the creativity in the interviewees' practice as an external influence.

Various actors were identified to have a strong influence in informing the interviewees' decisions on creation, dissemination and exploitation in their creative practices like their

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<sup>82</sup> David Vaver, "Reforming Intellectual Property Law: An Obvious and Not-so-Obvious Agenda: The Stephen Stewart Lecture for 2008," *Intellectual Property Quarterly* 2 (2009): 143, p.143

attraction to the potentials and inherent capabilities of the digital medium, their understandings and meanings of the 'digital', their political and ethical stance, contemporary art practices and philosophy, their academic and research backgrounds, strong intrinsic motivations, lack of knowledge of the law as well as their legal consciousness.

### **III. The Study: Some Findings**

One theme that emerged from the study was the lack of belief in both the prevention of copying in the digital domain and in the usefulness of copyright law for creators. This section will present some of the findings on how interviewees interpreted 'copying' and 'copyright' and illustrate how various actors influenced interviewees' understandings and decisions becoming important sources of the norms in their practice.

#### A. 'Copying'

"Electronic publishing is analogous not so much to the print shop of the eighteenth century as to the word-of-mouth communication, to which copyright was never applied."<sup>83</sup>

From the very start of the advent of the digital environment, it has been questioned whether it is possible to protect the right to copy.<sup>84</sup> As copying in the digital environment became an inherent part of both access to and use of the digital work, and at the same time the process of access became the means for further distribution, many commentators had argued for the "death of the right to copy." Samuelson had noted in 1990 that "the farther one moves away from printing presses and the kind of control this medium permits over copying, the less useful is the traditional copyright paradigm."<sup>85</sup> Similarly, Teilmann noted that "copyright law cannot cope with the order of the sameness on the Internet, for it has been shaped to protect 'original works' from 'reproduction' in a world of pre-digital technology."<sup>86</sup>

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<sup>83</sup> Ithiel de Sola Pool, *Technologies of Freedom* (London: Harvard University Press, 1983) p.214

<sup>84</sup> John Perry Barlow, "The Economy of Ideas," *Wired*, 2.03, March 1994

<sup>85</sup> Pamela Samuelson, "Digital Media and the Changing Face of Intellectual Property Law," *Rutgers Computer & Technology Law Journal* 16 (1990): 323, p.326

<sup>86</sup> Stina Teilmann, "On Real Nightingales and Mechanical Reproductions," in *Copyright and Other Fairy Tales*, ed. Helle Porsdam (Cheltenham: Edward Elgar, 2006) p.34

Despite scepticism in academic discourse, the right to copy has been strengthened and secured by broadening its scope, the introduction of digital rights management provisions and sustained resistance to increasing the scope of exceptions and limitations. The efficacy of preventing copying through the various legal measures currently available and stronger enforcement measures in the process of being introduced is unclear,<sup>87</sup> and solutions based on allowing access and not rigorous prevention of copying, like blanket licensing and levies have remained the subject of academic and policy discussions but have not found favour as regulatory solutions.<sup>88</sup>

In contrast to the scope of the right of copying and distribution that may be desirable for the content industries, the perceived desirability or necessity of strong protection is questionable for other types of creative production in the digital environment. Both the perspective and practice of the interviewees in relation to “the digital copy” illustrates that its protection in the digital domain was considered to be neither crucial to nor desirable in their practice.

#### (i) Digital ‘art’ practice

All interviewees were unanimous and unambiguous in their perception that they did not distinguish between traditional and digital artworks as to quality or artistic value. However, they did make a strong distinction between the nature of the digital and analogue medium and distinguished between “copying” in the digital world from the analogue world. Nearly all the interviewees suggested that a minimum amount of copyright protection was necessary for analogue works but they believed that the protection necessary for the digital environment needs to be different. They did not perceive strict prevention of copying in the digital domain to be crucial to their creative practice and were attempting to deploy business models in which economic value and return lay elsewhere than in the “digital copy.”

The strong influence of post modern theory and contemporary art practices on interviewees’ digital art practice was visible in the fact that the focus of interviewees’ interests shifted from

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<sup>87</sup> See Barron, ‘*Graduated Response*’ à l’Anglaise; Farrand, *The Digital Economy Act 2010*; Peter Yu, “The Graduated Response” *Florida Law Review* 62 (2010): 1373

<sup>88</sup> See Neil W. Netanel, “Impose a noncommercial use levy to allow free peer-to-peer file sharing,” *Harvard Journal of Law and Technology* 17 (2003): 1; William W. Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford: Stanford University Press, 2004); Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (Berlin: Springer, 2008) Ch.8; Department for Business Enterprise & Regulatory Reform (BERR), *Consultation on legislative options to address illicit peer-to-peer file-sharing* (July 2008)

protecting original copies to sharing them and exploring how the audience and other artists have a dialogue with these materials: 'how instead of what' and 'process instead of product' became the focal points. As Interviewee 18 explained with reference to copying and using others' works in his artistic practice:

"I think copying is part of it, there is a dialogue, if someone's actually taken your work as a basis of some other work that they're doing, it gives you that whole kind of another perspective on what you're doing. It's the idea that, I think it was Sol LeWitt who said, the artist doesn't necessarily know what his own work is about, he has an idea what it's about, but it's not necessarily the same as what other people think it's about."

He continued to explain that he saw it as peer criticism which is "just making your work more clear in viewing your work through other people's eyes. I mean that helps the whole creative process, you know encourages innovation and everything, so it's a positive thing."

Noting the disjunction between the romantic interpretation of copying in copyright law and the post modern interpretation in contemporary art practice, one commentator has noted that:

"...the verb 'to copy' means very different things to different people. In an accusatory legal context, 'to copy' describes an act of intellectual trespassing, often clandestine and performed for base motives, an act to be discouraged and punished whenever possible... For artists, on the other hand, 'to copy' carries completely different connotations."<sup>89</sup>

Further, it could mean a variety of things to the artist, like:

"Record, exercise, homage, parody, quotation, paraphrase, exorcism, caricature, metamorphosis, transformation, catalyst: at its simplest, a copy is way of recording a work of art. At its most complex, it establishes a dialogue across generations, cultures and centuries."<sup>90</sup>

These interpretations were clearly reflected in the interviews perspectives. For example, Interviewee 7 explained:

"I think if you are an artist or a creative person there's one thing worse than somebody plagiarising your image is that they don't. You know it's always better for someone to be

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<sup>89</sup> Karsten Schubert, "Raphael's Shadow: On Copying and Creativity," in *Dear Images: Art, Copyright and Culture*, eds. Daniel McClean and Karsten Schubert (London: Ridinghouse, 2002) at p. 361

<sup>90</sup> Schubert, *Raphael's Shadow*, p. 371

looking at your work, at least you know for it to be that current that people want to look at it. You know if it is being ignored, then that's definitely worse." Similarly, Interviewee 12 pointed out that, "it is also quite interesting to see your work crop in different and very odd places and contexts, and you think it's out there so it's been used and considered ... that it's a homage really and most of the people who'd see that would actually know where it's come from." He thought that not stressing on one's economic rights can even raise an artist's profile. In his works, "it can even raise your profile or your public worth to be seen to be nonchalant about your work being re-used and in not being interested to restrain the same might even get you more success."

Along with the contemporary art influence, another relevant factor was ethics: the ability to copy and use other people's work was seen as both healthy and necessary. Interviewee 8 pointed out that "I do think it's important that knowledge is in the public domain." In similar vein, Interviewee 4 explained:

"I like the idea that things are reusable and I've used other people's work in my work as well. I've come across a couple of years ago, some remakes of some of my stuff by... which I didn't know about personally and felt that kind of looked cool. I mean that's obviously part of a constant interpretative kind of process, and that it's very common these days and I think that's healthy."

The ability to share and use others' works was a strong theme and the right to copy was seen as something which would inhibit "others' use of what they make and their use of what others make." Interviewee 17, with many years of practice, reasoned that,

"I mean for artists working online, and particularly you know kind of the younger artists, pre-made imagery is in fact just as much part of the landscape as trees and you know streets. You know it's material which kind of constitutes the actual world of consciousness in which they live."

Interviewee 2, at an early stage of his career noted:

“I use third party imagery and logos and icons and things like that within my work, I’d feel like at a certain level people should be allowed to take things from mine if they want, you know.”

With reference to images and sounds of other people, he continued:

“I kind of see them as having equal value in the context of writing, they’re kind of like an alphabet I use to kind of create my work, just like writing sentences with you know.”

It was apparent that some of the interviewees’ own practice included appropriation, reconfiguration and building on others works, content and tools, which itself has a strong tradition within contemporary art practice. As aspects of their own practice and approach were contrary to the strict application of economic rights, that played an important role in informing their perspective and attitude on the protection of their own works. Interviewee 18 pointed out:

“In one way, you know, digital artists are quite often using other people’s work anyway, rephrasing it so, I mean we want to be allowed to do that, so we don’t want you know a copyrighted blanket that says you can’t use anything, there’s no fair use, you can’t use anything that anyone else’s created.”

He continued that although one might not want their work to be used for derivative works, it is something one has to sacrifice. He reasoned:

“to just let the work be free and to let people, to enable artists to use other people’s work, as the basis of new work, which has always been done. I mean it’s just, artists always have really to draw things but now it’s digitally done, so the means of reproduction are different but I think that the purpose of it is the same, so I don’t really think there’s much role for digital protection. I think you have to acknowledge that you know people can use your work, if you’re going to use other people’s work and I think it’s a much healthier way, it’ll lead to more innovation, more creation and stuff, that’s what it should be about.”

Similarly Interviewee 10 pointed out that, “I guess our soft approach is that information” and that “visual material and sound materials are important to be free.”

#### (ii) Nature of the ‘digital’ medium

Most interviewees reasoned that the nature of the digital medium meant that it is very difficult to control any potential copying or even re-use of their digital artworks or components. For example, Interviewee 3 explained his strong belief that the right to copy was designed for fixed media and, so far as it concerned him, it plays no role in the digital media. Similarly, Interviewee 4 with reference to copying mentioned that, "I don't think you can these days, it's out of your control, I think it's a good thing" while Interviewee 17 mused "You know, you can't really know who's using anything, so in a sense no, I mean there's not much we can do."

Interviewee 18 explained "You know people could be using your work all over and you wouldn't know about it... so you're unaware that's happening." Interviewee 2, who put a copyright notice on his website, explained the notice as, "I always kind of feel it means nothing because if someone's going to take it, they can take in the same way that I will." It was mentioned above that the interviewees were embracing the inherent features of digital technologies for creation of their artworks. With regard to copying, the corollary of that perspective was reflected in this first reasoning: they were aware of and did not want to work contrary to the inherent nature of the digital medium.

Most interviewees agreed that the component works of their digital artworks, like the text, audio, audio-visuals, or what is referred to as content, could be easy to copy in the digital medium but on occasion, depending on the type of digital artwork, copying the entire work may also be harder. Interviewee 16 gave the example of a networked performance. Digital installations were seen as difficult to copy as a whole by Interviewee 13, who mentioned "the installations definitely I don't think anybody else would bother copying it." Some interviewees reasoned further that even if some of their works are copied, they did not see any harm in online copying. Interviewee 8 explained that he did not see the role of the right to copy having relevance to what he created. In his words, "that's partly because I doubt that anybody could actually replicate it. Not technically I think, they can technically, but aesthetically I really don't think anybody would ... anyway people within net art community would know where the influences come from." Interviewee 21 similarly pointed out that it "is not trivial to copy the stuff that people like me do online without it being obviously done that. And then what'd be the point, especially if it's all

linked, it's all there available online, you know, one click in any direction, what's the point of copying it?"

Interviewee 16 questioned whether components of digital artworks were really important. He explained:

"I think I'm less interested in trying to really protect... as I am in sharing and exploring how the public or how other artists are having a dialogue with these materials because data are now really fluid things that also die very quickly. I mean, I have so many images on my website, thousands you know, how can I possibly remember all of them. And are they really so important?"

At the same time, several interviewees suggested that it would be useful to have legal protection to restrict others from using their digital works for commercial gain in certain scenarios. In the words of Interviewee 6, "I would hope the law would protect artists from unscrupulous use of their art for financial gain without recompense to the artist." When questioned as to what "unscrupulous use" meant, he explained that copying, sharing and dissemination by individuals for enjoyment or critique of the work would be acceptable use. But he continued in that, "You know if someone wants to use your work and make money from it, then they should pay you" and described that he would happily let anyone use or remix their work "as long as you then don't go away and make any money from it." He also explained that he was making fine distinctions regarding acceptable and unacceptable use according to possible motivations for which his work may be used.

Similarly, other interviewees pointed out that they would be upset, in varying degrees, if someone did exploit their work commercially. Interviewee 16 explained, "So would I be upset if someone took my images and then made a nice little animated video and sold it to television. I have no idea. If they would become very rich from it, without that I have any benefits, I might be sad yeah." Interviewee 12, gave an example of an analogue work that he had created at a very early stage of his career and perceived himself to have been "ripped off" for it by the commissioners of the work. He had not taken any recourse then but emphasised that, "If that

happened to me now, if I produced a piece of work and then it's reproduced in the millions, I'd be very angry now."

Similarly, Interviewee 10 asserted that:

"Having said that we take a very open approach and mention it, it does me sick in my stomach when I see advertisers ripping off artists' work and knowing that there are people being just ripping off and not having to pay for it but whether I think laws would change that in an effective and useful way I am not so sure."

The interviewees in particular highlighted that 'use' by other artists would not "bother" them but 'use' in relation to advertising and promotional activities by large industries or corporations would be particularly problematic. For example, Interviewee 8 mentioned with respect to someone copying or using their work: "so if it was, so if another artist did that I would be absolutely fine, I have no problem with that whatsoever. If a corporation did it then, no, I really don't see why they should be able to do that." Interviewee 2 pointed out that if his works had "been taken and used like really commercially to like promote a product or like a marketing campaign or something, I'd go crazy 'cause I hate that kind of stuff, but if it was just an artist, I wouldn't care too much."

The excerpts above exemplify a schizophrenic position: on the one hand the interviewees wanted to assert that "copying" is inevitable in this medium and cannot be controlled and on the other hand, felt that assertion of some control, in line with their political beliefs would be valuable. It is important to note that the term 'schizophrenic' is used here as a reference to something that is characterized by inconsistent or contradictory elements or the coexistence of disparate or antagonistic elements. And more specifically here, the experience or maintaining of contradictory attitudes towards legal protection under copyright. The term is not used in a medical health condition sense, and after some hesitation it was considered fair to deploy it since several interviewees consistently employed this term themselves to describe the dualities they faced.

For example, Interviewee 4 emphasised: “I’ve got this kind of a schizophrenic kind of situation here.” He went on to describe that on the one hand he had signed up for licensing of his analogue musical works through PRS and was receiving royalties through them, and similarly, he would also “make sure everything is in the right place for his CD release,” in terms of licences to be obtained and copyright to be asserted. But on the other hand, he wanted to be able to give away his other, what he described as, purely ‘digital works’ without asserting any protection in the digital domain because he did not see much point in controlling the digital copy nor care about copy protection there.

A related reason for viewing digital copying differently was based on what interviewees considered to be of value to them in their ‘digital artworks.’ Interviewee 2 explained, “Within a lot of my work, I can have like a kind of strong distinction between the imagery and the purpose of the piece existing, and the purpose the piece exists is more important for me than the image so... I wouldn’t kind of see it as kind of as a big problem if someone just took the image.”

Interviewee 17 similarly explained,

“I think if you’re making stuff that’s specifically tailored to go online then, particularly in the area that I’m working in, I can’t get too precious about legal rights and so on, I mean what you’re doing is, you’re allowing other people to play with material ... I think you’ll find a lot of people who work online are really not at all precious about content. They might get a bit prickly if people sort of take their idea and do something very similar with it. But I don’t think content is quite the issue.”

The fact that interviewees did not see the content as important but the organisation, presentation and its subsequent experience reinforced the strong influence of contemporary art practices and philosophy on interviewees’ perspective of what protection is desirable in the digital medium.

### (iii) Sustenance model

The interviewees perceived personal motivations related to being and remaining involved in the creative process, to be driving their practice, while economic interests were seen as a requirement or necessity in “being able to run the show.” The interviewees’ explanations of their

own 'business models', or perhaps more appropriately 'sustenance' models (as described and preferred by many interviewees), demonstrated that their work developed, spread, and propagated in different ways and that there was not any 'one model' or 'just one way of doing it' yet. Interviewee 15 who also taught at an art school and whose practice was with another artist as a team, described that:

“We find that we are sort of, a little bit inhabiting the art market, a little bit inhabiting the kind of public sector, that's where you might trawl down a little bits of funding to making something from Arts Council or some sort of similar body or perhaps just an academic funding body. And then of course we just make stuff, ourselves, you know, we have a studio, we have a practice, we have things that we're interested in and we just make our work, so we're kind of very pluralistic in that kind of respect.”

Indeed this was reflected generally in that the art practice of interviewees was neither strictly commercial nor strictly gallery nor strictly academic but each of those to some extent. The common theme was that their sustenance models were *portfolio based*: they developed organically and fluidly without a set model and the interviewees regarded their intellectual assets to be not merely the economic rights provided by copyright but also other intangibles like their brand and value,<sup>91</sup> practice of sharing and openness, and other skills like teaching and carrying out related activities.

Although the actual model of each interviewee was different, and the exploitation of copyright within each individual practice varied, certain key features of their models emerged. The interviewees were found broadly to fund their practice from a mix of some or all of the following opportunities:

- A commission to create digital artwork for an individual or an online or offline gallery or museum.
- Occasional sale of a digital artwork to an individual or an online or offline gallery or museum.
- Arts funding resulting from grants and prizes.

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<sup>91</sup> The value of the artists' brand image has been noted. See, Celia Lury, "Portrait of the Artist as a Brand," in *Dear Images: Art, Copyright and Culture*, eds. Daniel McClean and Karsten Schubert (London: Ridinghouse, 2002), who uses Damien Hirst's works as an example, to argue that trademark protection is more appropriate in such cases of contemporary artworks.

- Fee from exhibiting digital artworks or performing as part of a festival, presenting a customised work for an exhibition etc.
- Sale of one off or limited editions of analogue works which were primarily derived from their digital art works that resides on the internet or in galleries.
- Undertaking complementary, part time activities and full time, “second” jobs like teaching or research
- Occasionally undertaking workshops and seminars
- Having a curatorial practice.

The sustenance models of the interviewees also matched their perspectives on ‘copying’ in that they were found to be not using or relying on copyright protection in the digital domain. For example, some interviewees regarded the idea of exploiting copy protection in the digital domain as useless, because, they said, copyright was designed for fixed and not digital media. Interviewee 9 referred to piracy through peer to peer platforms and said, “I mean, we would probably experience the same thing in visual art world if people like myself were trying to sell their online works or things like that. But we’re not.” Interviewee 2, described that he could not see how money could be made from copies of digital works. He noted how music files were being copied and guarding against that was pointless as it went against the inherent nature of the medium.

Wide dissemination was also seen as the norm in the digital medium because it allowed for works to be released and accessed easily and quickly while commercial processes to exploit the right in copies was seen as slowing down this process. Interviewee 20, while explaining that he favoured wide dissemination and sharing, drew from his experience in academia and gave the example of a debate in the Ministry of Education on the possibility of publicly funded academic research being shared for free. He believed it would support sharing in artistic contexts and explained:

“I look at what’s been proposed as a good model, everything should be freely available to everyone and knowledge, you know, begets knowledge. And the more that we have access to it, the more to live it on, there’s no doubt that given the problems we are facing in the world today, we need to use knowledge to solve our problem.”

He continued to point out that, although art works are slightly different, in that they are an instance of knowledge or its adaptation, it appeared that there was no reason why a similar model could not apply to publicly funded digital artworks.

While wide and free dissemination was a foundation for sustenance of their art practice in that it helped generate indirect opportunities, it was also the result of a strong “sharing” ethic which meant that dissemination for them was a continuous process which did not end with the artists becoming established or having gained a reputation. Most interviewees believed that within their practice, and as a matter of course, they were making available some, if not most of their artwork for free on the internet and that they were not creating digital artworks with any expectation of exploiting such works through the assigning or licensing of exclusive rights in the work. No interviewee described the funding of their practice mainly or solely from the exploitation of their digital art by sale or licensing of such works in digital form. They were also not preventing copying of their works but instead disseminating their works online freely and as widely as possible.

However, the schizophrenic position, where the various actors that influenced the artists’ decision-making clashed with each other in a messy way and pulled them in different directions, was also occasionally reflected in some of their sustenance models: selling or licensing of analogue editions of digital art works was found along side refusal and reluctance to exploit or enforce copyright in the digital domain. The following observation by Interviewee 8 captures this duality:

“I think, like a lot of people working in this area, I do have a real dilemma because if there was another economic model of artists working but we just haven’t got one. So we keep flipping back between wanting the work to be free and then thinking I actually do need to make some money out of it.”

One commentator has pointed out that the programmers, hackers and net surfers who create ‘soft property’<sup>92</sup> understand the nature of the non-material goods they create.<sup>93</sup> It became apparent that

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<sup>92</sup> It is used here to mean immaterial property and as such generally all intellectual property.

<sup>93</sup> Barlow, *The Economy of Ideas*

the same applied to the interviewees, who were attempting to work, albeit not always consistently or successfully, with the nature of the digital medium by not attaching value to the digital copies of their works and extracting value from various other aspects of their creative practice.

### B. 'Copyright'

The lack of belief in prevention of copying in the digital domain was accompanied by general disenchantment with the purpose of copyright as well as suspicion of copyright law. This was not only an actor that informed their interpretations of 'copying' but also extremely influential in the strategies they adopted in their creative practice over all.

When laws are based on instrumentalist claims without solid real world evidence, they lose favour, respect and abidance of people. Unduly restrictive copyright system which does not meet the needs of consumers can trivialise the law for them. Similarly, strong copyright protection, which does not meet the needs of the creators, can lead to scepticism over the copyright system's benefits for them. Boyle has argued that the incentive argument for copyright along with a romantic view of authorial creation provide a 'powerful public rhetoric' to gain support for extending intellectual property rights<sup>94</sup> and explained how economic analysis as a type of rhetoric provides answers which are more partial and indeterminate than policymakers may believe.<sup>95</sup> Similarly, Kretschmer has also argued that the rhetoric of copyright benefiting authors has been largely determined by industry, which remains the main beneficiary of extended protection, even though it is only an investor in creativity and not a creator.<sup>96</sup>

The overarching perception amongst the interviewees was that copyright was "indifferent" to and not useful for individual artists. Although interviewees were not asked about what they thought of copyright generally, the following opinions on copyright law and policy were offered when interviewees were asked about the role or desirability of copyright protection in their own

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<sup>94</sup> James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, Mass.: Harvard University Press, 1996)

<sup>95</sup> James Boyle, "Cruel, Mean, Or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property," *Vanderbilt Law Review* 53 (2000): 2007, where he discusses the arguments for and against intellectual property rights and whether price discrimination will be the next rhetoric used to extend IPRs.

<sup>96</sup> Martin Kretschmer, "Intellectual Property in Music: A Historical Analysis of Rhetoric and Institutional Practices," *Culture and Organization* 6, no. 2 (2000): 197

practice or how they managed copyright related issues if they arose in their practice. The insights gained on interviewees' legal consciousness showed that copyright policy had little legitimacy for them. Further, the interviewees' perspectives were found to have been shaped by popular discourse on copyright provided in the news and other media to which the interviewees were 'clued-in' and three themes emerged from these perceptions.

(i) Un-pursuable by individuals

First, copyright was perceived to be useful only for those who can afford to protect it. The legal protection provided was believed to be "ironically un-pursuable" except by large corporations, which some interviewees referred to as "moneyed interests." Interviewee 11 explained:

"I find that copyright is normally only applied by those that kind of, can enforce, can force enforcement of it. So it's not something that's actually useful to common people who you know who don't really want to go to court over these things so you need to find some other way of negotiating these kind of things...so I think these things are bound in much larger economic processes and I don't get the sense that we're going to get governments really being particularly interested in coming up with copyright licence that really force individual protection. I think they will continue to only allow kind of corporate exploitation."

Interviewees mentioned not only their own beliefs and experiences, but also their general belief about other artists in the digital environment and analogue world. They perceived as reality the fact that most artists do not have the money to afford lawyers or obtain advice from specialists and do not have the ability to take a breach of their interests to courts. With reference to protecting his economic rights provided under copyright law, Interviewee 6 said his major concern was financial difficulty:

"I would have to pay a lawyer, which probably wouldn't be worth my while in the long run. But there's no freely available method of resolving disputes. If you write to someone and they ignore you, then you have to go to a lawyer really. And that's fine except for the fact that artists can't necessarily afford them so that is a problem."

A similar sentiment was voiced by Interviewee 18, who noted that:

“I mean if it actually comes down to it, you can’t actually protect them unless you’ve got money to go to courts. So it protects the rights of the people who have the ability to go to court. So you know, for the great majority of artists, if their work is infringed in some way, well they really have very little to come back on it, because they don’t have the money to go to court, to take on a corporation. The protections are not aimed at kind of small artists, they’re aimed at the corporations and they protect them. It doesn’t help the individual artist in any kind of real way.”

It became evident that the artists did not perceive copyright to be useful because of the transaction cost involved in enforcing the right.

A similar problem with the transaction cost in obtaining permission to use third party copyright works was pertinent for Interviewee 19, one of the most well known artists of those interviewed for this study. He noted that:

“I have no interest in the copyright system or copyright law. It is made for big corporations to use... It is indifferent to everyone. It’s only for people who own money. It’s not useful for anyone else. I don’t earn any money from it, I earn money from teaching, so it plays no role for me.”

He did not discount the fact that protection for artists and artistic works was necessary, but suggested that copyright was not providing for his “needs” of being able to create what he wanted to as it puts barriers through the requirement of permission and payment in using others’ works.

Interviewee 2 stressed that copyright protection could be particularly relevant for him and explained through an example that:

“Let’s say I took and augmented a logo of an oil company or something like that and made it my own piece of art, I don’t feel like I’m affecting their brand or reputation in the way that if they took what I did, and took my brand and reputation and put it in their context, especially at the level of career I’m at ‘cause you know, like that would, that kind of thing could make me famous for the wrong reasons or something like that and I wouldn’t want to get involved in that.”

Interviewee 14, who also saw a possible role for copyright for artists, pointed out that:

“So whilst the law is perhaps somewhat indifferent to artists needs, we’re not yet perhaps collectively looking at these issues ourselves and requesting action ... I think it’s really about the emphasis on artists working as single independent entities and how that impacts on their perspectives on this issue and also how the law/establishment views them, again as small bodies.”

Interviewee 7’s views on legal protection summed up the concerns of many others. He noted:

“For me as an artist, yeah, to be honest, it kind of relegates itself, just because of the way that most conflicts of interest happen below the kind of threshold of what would be kind of viable to pursue within the legal system, just because of the fact that most conflicts are tiny ones that happen constantly in day to day life.”

#### (ii) Duration of copyright protection

The duration of copyright was used as another example by some interviewees to make the point that copyright legislation reflected corporate interests more than individual artist’s interests. Interviewee 17 referred to US copyright legislation and mentioned, "you’re cynical about copyright, that every time Mickey Mouse seems to be about to go out of copyright, it gets extended some more. If you look at the early days of copyright, I believe in Britain it used to subsist with the printer, didn’t it?" His concern was that, “there was stuff that was out of copyright, and then bang suddenly was back in copyright again” and that it was a “derision” which a lot of artists and creators had to deal with.

The US example was popular and Interviewee 7, in similar vein, pointed out:

“There’s this fact quoted by Lawrence Lessig, it says that US Copyright has been extended several times just in time to stop Mickey Mouse falling out of copyright.....it's the idea of corporate, a corporate creation, that needs to be protected for corporate interests and where does that end?”

Interviewee 20 emphasised:

“Is copyright law sufficient? I would say it’s overly sufficient. I’d say it’s too rigid and too limiting. I think some of it is functioning to deter innovation and to close down sharing and that in fact the law could be relaxed significantly especially in the areas of patent law, the ownership of creative product, the current duration which I think is 70 years after?... I think that’s pretty long.”

The duration of copyright was also problematic in so far as moral rights lasted beyond the life of creators, and could be exercised by their estate. Interviewee 18 explained his problem: “If you take something like say the Joyce Estate, their idea of what their moral rights are, is in most people’s opinions outrageous, you know where no one’s allowed ever to quote. So you get the estate who didn’t actually create the work themselves, and you have the situation where they’re impeding people’s appreciation of the work of Joyce.” Interviewee 17 similarly pointed out:

“If you’re working with a lot of material that wasn’t really kind of formally authored, you know lots of industrial films, promotional films, all that sort of thing. And very often the bodies that had produced this work either no longer exist or had passed their copyright over and once you’re in that position, you’re in quite an interesting world, because you’re actually dealing with archives and people like that, who interpret their role of defending rights of the original copyright holder very differently. For example ...they could see what we were trying to do, but they also felt that it was their duty to kind of stand for the moral rights of the original film makers, it felt that their job was to actually stand up for the original intention of the film and sometimes the original intention of the film and the actual manifest content are very, very different.”

The sentiment that the duration of protection had gone too far and did not necessarily reflect the individual creator’s interests was echoed in six other interviews. Interviewee 7, who had said that copyright law should have an important role to play in his own practice, concluded that:

“I think in our civilization, we’ve gone too far down that route, definitely you know, copyright protection is now automatic and draconian, lasting for effectively forever.”

These views echo the renewed critique of the duration of copyright protection in academic discussions owing to the extension of the term of copyright in the US,<sup>97</sup> UK,<sup>98</sup> and EU.<sup>99</sup> The interviewees' use of duration of copyright as an example showed awareness of popular discourse on an issue which has garnered substantial media attention but also scepticism on an issue where the 'protection of authors' flag has been hoisted to justify the calls for extension.<sup>100</sup>

### (iii) Expansion and Enforcement of copyright law

“Copyright is increasingly used as a form of corporate legal intimidation.”<sup>101</sup>

The enforcement of copyright by corporations and the recent push for stronger laws as well as legal enforcement of copyright in the digital domain was also used as an example by the interviewees to show copyright's incompatibility with artists' interests. Some interviewees voiced concerns over the use of digital rights management protection by corporations which could prevent perfectly legal actions which artists might want to conduct. In restricting artists' access to resources, the rights management protections systems could in turn restrict their creative abilities. Interviewee 9 while describing how his own practice could be affected, pointed out:

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<sup>97</sup> See, *Eldred v. Ashcroft*, 537 U.S. 186 (2003); OPENLAW: *Eldred v. Ashcroft* <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/> (accessed July 12, 2012)

<sup>98</sup> Martin Kretschmer, "Creativity Stifled? A Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings," *European Intellectual Property Review* 30, no. 9 (2008): 341; Natali Helberger, Nicole Dufft et. al., "Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea," *European Intellectual Property Review* 30, no. 5 (2008): 174

<sup>99</sup> The discussion on extension of copyright to 70 years for performers, now enacted, was then ongoing in the EU see, European Parliament "Music copyright to be extended to 70 years for performers" <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20090422IPR54191> (accessed July 12, 2012); Nick Owers, "Term of Protection of Copyright-Related Rights in the EC," *Journal of Intellectual Property Law & Practice* 4, no. 5 (2009): 321; Reto M. Hilty, Annette Kur et. al., "Comment by the Max-Planck Institute on the Commission's Proposal for a Directive to Amend Directive 2006/116 Concerning the Term of Protection for Copyright and Related Rights," *European Intellectual Property Review* 31, no. 2 (2009): 59; Bernt P. Hugenholtz, "Open Letter Concerning European Commission's "Intellectual Property Package"," *European Intellectual Property Review* 30, no. 12 (2008): 497

<sup>100</sup> The industry publicised the support it had from artists on the issue through an advert titled 'Fair Play for Musicians' in the Financial Times on December 7, 2006 as reported in "Musicians Sign Copyright Advert," *BBC News*, December 7, 2006; a commentator in this respect finds such support rather odd in that the proposed extension may not actually work in artists favour or benefit, Andreas Rahmatian, "The Gowers Review on Copyright Term Extension," *European Intellectual Property Review* 29, no. 9 (2007): 353; see also, Gowers, *Gowers Review of Intellectual Property* which notes at Para 4.32 the comments by Dave Rowntree, drummer with Blur and The Ailerons, that, "I have never heard of a single one [band] deciding not to record a song because it will fall out of copyright in 'only' fifty years. The idea is laughable."

<sup>101</sup> Coombe, *Commodity Culture, Private Censorship, Branded Environments, and Global Trade Politics*, p.370

“I mean the things that I do kind of find very disturbing coming out of the legal protection and it mostly settles around music and you know music and film, is the good old RI, what is it, RIAA, and the sort of incessant need to cling to their old models of commercial viability in this day and age which is just absolute fallacy and the problem is that in all these things that they’re trying to implement in terms of digital rights management, are affecting things outside of their own industry. I mean those are the things that I find very disturbing.”

Similarly, although some interviewees saw the enforcement of copyright protection in cases of file sharing on the internet to be quite ‘contentious,’ it was viewed as being more about the conflict between the industries and intermediaries, and their business models rather than creators’ interests. The opinion of Interviewee 7 on the issue was that:

“People get so kind of hung up on the right and wrong of things, whereas the kind of economic realities of things underlie everything and those kind of things cannot really be fake. I suppose it is kind of ironical that, may be ironic isn’t the word. If you look at the way that music has changed since the advent of personal ubiquitous internet connections and file sharing, it’s the most obvious example, a lot of people say all this stuff should be free, information should be free and there’s this kind of almost glamorous connection being made between freedom and the ability to copy stuff, and at the same time you know recording artists association of America or whatever say all these people are stealing. And that’s a bit harsh. But there is something taking place there. And someone is losing out and someone is gaining. To say that just as you know the person who listens to all this music for free is gaining and the artist is losing is way too naïve.”

Similarly, Interviewee 9 felt that the enforcement stance taken by corporations was not really about the interests of the creators in which the corporations invest. With reference to the content industry’s continually asserted position that copyright protection is benefiting ‘creators’ interests’, he continued to pointed out, “Oh it’s such a joke.” He said that it was not at all complimentary to what is of interest to creators and reasoned that, “I think the reason the public is so fed up with and I’m very fed up with the media companies, is for years they’ve

monopolised the situation, they have taken so much money away from the artists and now they're complaining, because in a sense, they are no longer necessary."

Interviewee 18 questioned where the value resided in the traditional business models for entertainment products. He referred to a news item that he had read, of a rock band that decided to stop selling CDs in their gigs as it was cannibalising the sales of their higher priced t-shirts. He commented that "copyright laws are chasing an old model that has already departed" and went on to say: "I think it's more the industry, or not even the industry, the industry model that's existing at the moment that's suffering." He also referred to the film industry model present at the time of the advent of video recorders and commented how the current spate of litigation is "very short sighted" and that there is a lack of imagination in seeing how the present ability to copy can be used to help everyone, including creators. He referred to an Economist survey on 'knock-off' fashion and said:

"I think you know in that, in the whole kind of digital you know copyright thing, it's going to turn out something like this, there's going to be a great future for creation and it's going to be based around people copying but this will be the engine that drives it forward, it's just a lack of vision I think, that people don't see."

There was also concern that copyright could be invoked by corporate interests to suppress an artist's freedom of speech. It did not help that many of the interviewees viewed some recent claims of copyright protection infringement quite negatively, because these claims either targeted artists or had potential to restrict artistic creativity. Interviewee 18 referred to two more examples that he had read in the news about Volkswagen threatening to sue an artist for copyright for referencing one of its cars in a painting, and alleging copyright violation over a video posted by a Youtube user parodying one its commercials. He said, "you know copyright can be used basically as a tool to silence criticism and it's been done and you see it has been recently." Although he continued to point out that sometimes artists "do get away with using copyright material blatantly and pass under the radar of the copyright holder," the chances of legal threats can make artists not just mindful but also fearful. Therefore, they avoided using works in which the copyright is owned by corporations. Interviewee 15 explained:

“I’m concerned that people are trying to take more and more ownership of things which exist on the world wide web and I think things are becoming ever more difficult to actually navigate and negotiate without infringing copyright and I think that’s extremely worrying ... I think the main concerns would probably be whether we use materials and then we just be sued. And it’s less about the way in which people might use the work we make. And it’s more to do with how we might be violating some law ourselves. Because in the end, a lot of what we’ve done, would fall under the umbrella of our authorship as artists and in a way our brand as artists kind of protects in itself a lot of our output.”

Several interviewees also pointed out their other concerns regarding violating “the law” generally and how censorship, a clampdown on online information, as well as state policing on the basis of morality and other grounds also affected artistic freedom. These additional observations were found to have an important indirect bearing because this sceptical attitude to ‘the law’ complemented the interviewees’ general perception of the role of copyright. The rise of corporations as right holders, commodifiers and exploiters of copyright as well as the role of private power in shaping copyright policy has been widely noted in academic discourse<sup>102</sup> and even observed in a recent an independent review. The interviewees’ resentment of what copyright offers to them as creators and what it offers to corporations appeared to be directly resulting from these developments.<sup>103</sup>

#### **IV. Concluding Remarks**

The above section provided a brief snapshot of how copyright law and policy interacted with the everyday day practice of digital artists by illustrating the source of norms influencing the interviewees’ lack of belief in prevention of copying in the digital medium as well as their

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<sup>102</sup> Susan Sell, “The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play” (IJIP Research Paper no. 15.American University Washington College of Law, 2010); Fiona Macmillan, “Copyright and Corporate Power,” in *Copyright in the Cultural Industries*, ed. Ruth Towse (Cheltenham: Edward Elgar, 2002); Fiona Macmillan, “Copyright, Culture and Private Power,” *Prometheus* 16, no. 3 (1998): 305; Jane Gaines, *Contested Culture : The Image, the Voice, and the Law* (London: BFI, 1992); Peter Drahos and John Braithwaite, *Information Feudalism* (London: Earthscan, 2002)

<sup>103</sup> “Good economic laws must have at least three characteristics: they must be (1) clear; (2) just; and (3) efficient ... A failure in any aspect is costly and lessens the respect law should attract. The public will pay and be restricted more than it ought in return for the benefits the laws claim to offer it. People will then tend to ignore or avoid the law, and will resent those who support it and who tell them off.” Vaver, *Reforming Intellectual Property Law*, p.144 [own emphasis added]

general disenchantment with the purpose of copyright as well as suspicion of copyright law. This section emphasises that understandings of ‘copyright in action’ in new creative activities in the digital environment, particularly through the creators’ perspective, can offer valuable insights for policy making in United Kingdom.

#### A. ‘Copyright in Action’

“Copyright law is the thing that protects us as artists but I think what artists are doing... and it’s not just artists ... we’re as humans developing these new ways of working, then I think we have to articulate those ways of working more succinctly and then once we have that understanding of these new ways of working, we can see which aspects need protection.”- Interviewee 8

The interviewees in the study did not perceive strong or strict enforcement of the right to copy in the digital domain to be crucial to their practice. Although their views show a schizophrenic position, whereby they try and differentiate the protection they wanted according to the medium as well as the context in which the work may be copied or used, it also reflects a desire to work with and adapt to the features of technology, to realize its full potential, as opposed to the law, which remains short sighted in its attempts to mirror the realities of the analogue medium in aiming to preserve the interests of a certain section of content owners and producers. This was also displayed in the fact that the interviewees had alternative, independent and portfolio based business models which displayed an attempt to think differently and not unquestionably or uncritically adopting standard routes for exploiting the exclusive rights provided under copyright law in their digital artworks.

Instead, as discussed above, the interviewees saw the economic value in their works, for purposes of exploitation, to lie in the physical object; or, the idea itself, or in familiarity with the work;<sup>104</sup> or, their brand name and reputation as artists;<sup>105</sup> or, their persons being attached to experiencing the work at the time of experience or performance of the work.<sup>106</sup> The output and

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<sup>104</sup> Giving away a work may raise and as such making people familiar with it may raise demand for it, Barlow *The Economy of Ideas*

<sup>105</sup> When the IP protection derives from the artist being the only source of it, Barlow *The Economy of Ideas*

<sup>106</sup> Value based on relationship rather than possession, Barlow *The Economy of Ideas*.

the development trajectories of their practice itself were generally outside the present standard routes to commercialisation, which are formulaic in nature for most part. Several factors contributed to their reasoning including their close relationship with digital technologies, the influence of contemporary art philosophy, their ethical stance, and over all disenfranchisement from copyright due to the law's image.

The potential impact of copyright law in the creation and dissemination of works in the digital environment has been very controversial, leading to a wide debate between proponents of stronger copyright legislation to protect the status quo against those who support weaker copyright protection with an aim to restore the balance within copyright framework. In this environment, there have also been claims that digital piracy shows 'a vote of no confidence in existing business models and legal solutions'<sup>107</sup> and doubts over the extent to which exploitation of copyright under traditional business models can continue to be efficient and workable.<sup>108</sup> Exploration of new business models have found particular favour in policy discussions as being one of the solutions in adapting to this changing environment.<sup>109</sup>

While newer businesses models are emerging in the larger entertainment industries, the smaller independent sectors are arguably leading in the move away from older models of dissemination and profit generation, based on the rights granted through copyright, and having more open attitudes to 'value-based' and realistic business models which might be more suited to the potentials brought by the digital medium. Consequently, research on 'copyright in action' in the day to day practice of various creative practices can make a useful contribution by offering insights of how copyright is being used, resisted, or ignored in emerging business models in the digital environment. In particular, a focus on where and why smaller and independent creators perceive value to lie in their practices, as well as where and why they struggle in finding relevance of copyright protection, can offer important lessons for policy making this area.

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<sup>107</sup> Viviane Reding, "Europe's Fast Track to Economic Recovery" (paper presented at The Ludwig Erhard Lecture 2009, Lisbon Council, Brussels, July, 2009)

<sup>108</sup> See Hargreaves, *Digital Opportunity*

<sup>109</sup> Hargreaves, *Digital Opportunity*; IPO, (c) *the Way Ahead*; DCMS, *Digital Britain final report*

For the copyright system to support creativity, it requires the confidence of its stakeholders, in particular the creators who ‘must see it as *appropriate, effective, fair and reasonable.*’<sup>110</sup> In contrast, the snapshot of interviewees’ legal consciousness above, demonstrates that they perceived the system to be inappropriate, ineffective, unfair and unreasonable. It was apparent that the interviewees were knowledgeable of the discourse on copyright law in the popular media which contributed to their scepticism as to the value of protection offered by copyright law to creators as well as its wider purpose in society. They did not appear to be convinced that copyright *was* working for the creator’s benefit although they did not clearly discount that it could. Brimelow had noted a decade ago that: “Without a doubt the David and Goliath stories are played up for all their worth to make good copy, but they may well be most of what the ordinary citizen hears about intellectual property and the stories do the system no service.”<sup>111</sup> She also noted that the relevance and value of the intellectual property system changes with the changing environment and the evolution of people’s perception of ‘what is happening and what is *“right.”*’<sup>112</sup> That change in perception, so far as the interviewees were concerned, was reflected in the above theme.

The contested nature of copyright is reflected in the fact that often creators, and indeed other stakeholders may lack accurate knowledge of copyright law, but have strongly held opinions on copyright.<sup>113</sup> And a challenge for copyright policy making is not just to increase awareness of and access for the users of system, but ensure that it retains the faith of those whom it primarily claims to benefit. Research on ‘copyright in action’ can provide insights into creators’ meanings and understandings of the role of the copyright and retrieve the focus of the theoretical discourse on copyright law to the practical issues<sup>114</sup> faced in various creative sectors, which despite being affected at every level by copyright law as well as new technologies, have not been the subject of sufficient empirical inquiries.

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<sup>110</sup> IPO, *(c) the Way Ahead*, p.7 [own emphasis added]

<sup>111</sup> Alison Brimelow, "Does Intellectual Property Need a New Set of Wheels?" *European Intellectual Property Review* 23, no. 1 (2001): 44 at 45

<sup>112</sup> Brimelow, *Does Intellectual Property Need a New Set of Wheels*, p.48 [own emphasis added]

<sup>113</sup> “Copyright strangles creativity. Copyright rewards originality. It is a nuisance to the public that unduly enriches a few people. It is the backbone of our knowledge economy that fuels progress. Hate it, love it, break it, protect it; *few people lack strong opinions about copyright and its place in society.*” – Economist Debate Economist Debates, "Copyright and Wrongs," *The Economist*, May 5, 2009 at the moderator’s opening remarks by Kenneth Cukier at para 1 [own emphasis added]

<sup>114</sup> Wheeler and Thomas, *Socio-Legal Studies*, p.273

## B. Creators' perspective

The position of creators as one of the stakeholders with an interest in the nature of copyright policy has been explicitly acknowledged<sup>115</sup>: "Creators are an essential part of the picture and it is important that our copyright system recognises and acknowledges their creative endeavour."<sup>116</sup> But there are various interests which must play a role in the formation of copyright policy (e.g. creators, rights owners, users, general public and wider public interest) and it is important to question why the focus on creators' perspective can be beneficial. While "author" perspectives on the early history of copyright have emerged from the 1970s and continued until the 1990s,<sup>117</sup> academic discourse which presents the authors' perspective on the more recent state of copyright remains quite small. Further, the general lack of empirical evidence on copyright in the UK, as noted above, means that the empirical research on creators' perspectives in this backdrop is even more limited.

A handful of studies in the UK have consulted creators directly or relied on secondary data pertaining to them to assess whether copyright acts as an incentive for them.<sup>118</sup> A significant number of these have primarily focused on authors' earnings data from copyright related activities, accompanied by surveys with creators that have been carried out through an organization or specific group of creators<sup>119</sup> and collectively suggest that there exists little

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<sup>115</sup> SABIP, *Strategic Priorities for Copyright*, p.8

<sup>116</sup> IPO, *(c) the Future: Developing a Copyright Agenda for the 21st Century*, p.5

<sup>117</sup> Kathy Bowrey, "Who's Writing Copyright's History?" *European Intellectual Property Review* 18, no. 6 (1996): 322 ; Kathy Bowrey, "Who's Painting Copyright's History," in *Dear Images: Art, Copyright and Culture*, eds. Daniel McClean and Karsten Schubert (London: Ridinghouse, 2002); see also analysis based on or referring to practice of or incidents relating to artists, Karsten Schubert, "Raphael's Shadow: On Copying and Creativity," in *Dear Images: Art, Copyright and Culture*, eds. Daniel McClean and Karsten Schubert (London: Ridinghouse, 2002); Andrew Wilson, "'this is Not by Me': Andy Warhol and the Question of Authorship," in *Dear Images: Art, Copyright and Culture*, eds. Daniel McClean and Karsten Schubert (London: Ridinghouse, 2002)

<sup>118</sup> For example, see Ruth Towse, Christian Handke and Paul Stepan, "The Economics of Copyright Law: A Stocktake of the Literature" *Review of Economic Research on Copyright Issues* 5, no.1 (2008): 1, p.8

<sup>119</sup> For example, see the studies summarised in Martin Kretschmer and Philip Hardwick, *Authors' Earnings from Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers* (Centre for Intellectual Property Policy & Management, December 2007) and Ruth Towse, *Creativity, Incentive and Reward: An Economic Analysis of Copyright and Culture in the Information Age* (Cheltenham: Edward Elgar, 2001); see also, Martin Kretschmer et. al, *Copyright Contracts and earnings of visual creators: A survey of 5,800 British designers, fine artists, illustrators and photographers* (Centre for Intellectual Property Policy & Management, 2011); Martin Kretschmer, *Does copyright law matter? An empirical analysis of creators' earnings* (Working Paper, May 2012); Kretschmer and Hardwick note that several studies have relied on 'three different sources: (a) government statistics

empirical backing for many of the benefits that the copyright system is perceived to bring to creators. As such, the arguments in favour of such benefits remain rhetorical, historical or philosophical.

These studies are very valuable in providing generalized findings on whether the copyright system rewards creators. However, richer complementary evidence is also required on how copyright law trickles down and is played out in the day to day practice of individual creators e.g. how are the meanings and understandings of individual creators' shaped in the evolving digital environment; what are creators' motivations and reasons behind copyright related decisions; how do creators prioritize such motivations and meanings; what is their attitude to and experience of copyright; where and why is copyright resisted or seen as beneficial; and how the context and specificities of different types of creative activities affect these issues. At the same time, all types of individual creators, including those which may not be part of organizations but still have creative practices whose sustenance models are affected by copyright law, need to be represented. Yet, studies addressing the perspective of individual creators with a focus on how copyright plays out in their everyday practice remain minimal.

For copyright policy, the issue of how copyright is being, and will be, used and managed is not just a theoretical issue but one of immense practical influence lying 'at the heart of creative activity and industries that support it and diffuse its output.'<sup>120</sup> Copyright law affects the life of a creative work from point of creation - since the work may, and usually does, use and build on third party copyright works in a variety of ways, particularly in the digital environment; through to dissemination - the choice of licensing, type of license used; and exploitation - business model and routes used as well as types of protection asserted. Indeed copyright law is intended to affect all these processes of creation, dissemination and exploitation. As such, from 'start to finish' copyright can affect a creative practice. All of the creators' decisions are likely to be based on the information about copyright law that they may have, they believe they have, or do not have, usually without any recourse to specialist advice. Further, although most creators may never make legal claims or bring actions to enforce copyright law, or be subjected to them, yet the law

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(census, labour market surveys, tax); (b) questionnaire surveys of specific professional groups; and (c) collecting society payments.' Kretschmer and Hardwick, *Authors' Earnings from Copyright and Non-Copyright Sources*, p.53

<sup>120</sup> SABIP, *Strategic Priorities for Copyright* at pg. 10

has a perceived utility or hindrance and actual impact on their practice and behaviour. This reflects the need to study, in detail, the subtle processes in play in the creation, production, dissemination, exploitation and consumption of different new creative outputs but also underlies the importance of examining the creators' perspective.

Additionally, although creators remain the central character for law and policy, it is unclear as to how well they are represented in policy making. It has been argued that 'the author's voice is one that has been submerged in the development of copyright law and that copyright law therefore is insufficiently sensitive to authorial perspectives about the creative process.'<sup>121</sup> From a positivist stance, it can be argued that this is not the case, because legal policy assumes and acknowledges the presence of conflicting groups and interests as stakeholders, including creators.<sup>122</sup> Consequently, whether copyright protection is adequate or inadequate in protecting creators, legal policy reflects a balance amongst all stakeholders' views resulting from public enquiries, hearings and consultations. However, the representation of authors' perspective still remains missing and there are two main reasons against these assumptions.

First, not all interested parties possess the same amount of power to influence policy making: along with the political power and the power of 'rhetoric', the economic power. Although creators are represented through creators' interests groups, the economic reality is that individual creators and authors' groups do not generally have the same financial capacity as some other stakeholders to have their interests represented during the formation of legislation, particularly the industries, being the commercial content producers and distributors who are well represented by various industry bodies in formulation of policy.<sup>123</sup> To quote the latest independent review of

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<sup>121</sup> Roberta Rosenthal Kwall, "Author- Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine," *Southern California Law Review* 75, no. 1 (2001): 1, p.1

<sup>122</sup> For examples, see SABIP, *Strategic Priorities for Copyright; IPO, (c) the Future: Developing a Copyright Agenda for the 21st Century*

<sup>123</sup> Charlotte Waelde and Hector MacQueen, "From Entertainment to Education: The Scope of Copyright?" *Intellectual Property Quarterly* 3 (2004): 259; Boyle, *The Public Domain: Enclosing the Commons of the Mind*; Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: The Penguin Press, 2004); Charlotte Waelde and Hector MacQueen, "From Entertainment to Education: The Scope of Copyright?" *Intellectual Property Quarterly* 3 (2004): 259

Intellectual Property in the UK again: “On copyright issues, lobbying on behalf of rights owners has been more persuasive to Ministers than economic impact assessments.”<sup>124</sup>

Second, the interests of authors tend to be subsumed within the interests and views of the entrepreneurs. The industry claims to be speaking for the authors and even ‘much of the economic theory on copyright makes no distinction between the “author” or “creator” and the “publisher”, considering them as one.’<sup>125</sup> However, this ‘harmony of interests between creators and intermediaries’ is conceptually doubtful and empirically problematic;<sup>126</sup> and, there remains potential deviation between interests of creators and those of the rights holders and intermediaries managing their rights.<sup>127</sup> This is not to deny the practical relations or nexus between creators, entrepreneurs and collecting societies that has existed both in history and the present, but to highlight that tensions and conflicts exist between the interests of each of these groups.

This chapter used first-hand accounts from digital artists and explored one theme of the lack of belief in both the prevention of copying in the digital domain and in the usefulness of copyright law for creators, to illustrate how copyright law and policy are played out in a new creative practice, in ways which in contrast with their own purpose. If new creative activities are to be supported by the legal framework then such laws must gain confidence of the users of the system as being appropriate fair and reasonable.<sup>128</sup> More empirical research on ‘copyright in action’ as well as creators’ meanings, understandings and use of current system, across the spectrum of new creative activities, will be a step in the right direction.

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<sup>124</sup> Hargreaves, *Digital Opportunity*, p.6

<sup>125</sup> SABIP, *The Relationship between Copyright and Contract Law*, (Report 04, 2010), p.19

<sup>126</sup> SABIP, *The Relationship between Copyright and Contract Law*, Section 2.4

<sup>127</sup> Numerous incidents reported in news reflect this, for one example see "Too many California girls?" *At Last ... the 1709 Copyright Blog*, August 26, 2010

<sup>128</sup> These being some of the aims as put forward in Intellectual Property Office, (c) *the Future: Developing a Copyright Agenda for the 21st Century*, (December, 2008)