In Conversation with Professor Andreas Rahmatian

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Professor Andreas Rahmatian is Professor of Commercial Law at the University of Glasgow School of Law. Originally from Vienna, he obtained his first degree in law and a PhD in Private Law from the University of Vienna, and completed another degree in musicology and history there. He holds an LLM from the University of London. He worked as an associate attorney-at-law in Vienna and qualified as a solicitor with a City firm in London before he became a full-time academic. He has been a fellow at the Institut d'études avancées in Nantes, France. His research focuses on intellectual property law and commercial law. His books are Copyright and Creativity: The Making of Property Rights in Creative Works *(2011),* Lord Kames: Legal and Social Theorist *(2015), and* Credit and Creed: A Critical Legal Theory of Money *(2019).*

***CJLPA:* Do you think all forms of creativity should be protected by the law?**

Professor Andreas Rahmatian: It's a difficult question, of course, because it depends what you mean by creativity. Here we probably talk about creativity in relation to copyright in particular, because creativity can otherwise be in relation to all sorts of things. Now the problem with copyright creativity is that it's not necessarily dealing with artistic creativity. Obviously, artistic creativity is also part of copyright creativity, but the understanding of creativity in copyright is based on a normative definition, if not a completely clear one. Whether that is artistic creativity as an artist understands it is actually immaterial. So the question is, when you ask, 'Should all forms of creativity should be protected by the law?', it is already the case that non-artistic creativity is protected by the law. Whenever you have got a kind of selection or arrangement which somehow points back to some individual, then you have got, as it were, creativity in the sense of copyright as 'originality'.

The judgment of *Infopaq*[1] and the following cases of the CJEU in the EU didn't change very much the originality ideas in the UK, in my opinion. In the United States the understanding of originality is pretty much the same, but whether that original work is also artistic in any way is rather irrelevant. It [the work] can be rather trivial. That is actually immaterial for the protection. And this is how copyright laws envisage creativity—even on the Continent, where they operate with all sorts of devices to water down the (theoretically) more personal requirement of the author's input. In theory there is an approach more geared towards creativity in the sense of artistic creativity, but in reality this is much less so. There is, for example, this nice legal concept of 'small change', or *kleine Münze*—it is really called like that in Germany—where you have works of everyday use, really ordinary works which can have some notional modicum of creativity put in, and you still get protection. Then below that level you quite often have neighbouring rights, for works which do not fulfil the required creativity level or originality level, but the neighbouring rights still protect them. Then below these, you have under certain circumstances protection against parasitical competition in the sense that you actually have a prohibition to copy someone else's work. So you have got all sorts of protection levels, both on the Continent and in the UK (or in the common law countries), and they achieve protection in different conceptual ways.

Now some people will say 'creativity' also means creative investments, or even 'creative' accounting, which is usually illegal but perhaps also creative. So it's very hard to pin down 'creativity'. A typical problem is restoration work in the arts, by a picture restorer, or a restorer of musical pieces. The classical case in that area in the UK was the *Sawkins v Hyperion* case, 2005,[2] which shows that for copyright protection you need not be creative in the sense that you are actually creating anything new. Artistic creativity, if you go to an art school or to a conservatoire as a composer, has a tinge of novelty, but we are not interested in novelty in copyright law. So the restorer, who actually writes his counterpoint in the style of the music of the late seventeenth century, as Sawkins did, in order to restore the missing parts to produce a performing edition, did exactly not [sic] mean to be creative but faithful to the work to be restored. It's meant to be in the style of the Baroque composer. And yet it is protected as original for copyright purposes, and there's no doubt that this also applies on the Continent: the result in such a case would have been, and in fact was, the same, because in France, in a parallel case, Sawkins' work was viewed as being original. That was decided under French copyright law, although the French authors' rights system is supposed to be totally different. It's a very nice case where we have two different legal systems with essentially the same facts, the same claim in both cases, and the same result, based on a different conceptual system. Although it may be quite difficult to

1 Case C-5/08 *Infopaq International v Danske Dagblades Forening* [2009] ECDR 16.

2 *Sawkins v Hyperion* [2005] 3 All ER 636.

appreciate this from an 'artistic' viewpoint, the creativity or the skill of a restorer should get protected. In fact, in France and in Italy there are quite a few cases in relation to restoration, especially in the visual arts, and there is no doubt that they get protection.

It's a bit hard to say this: it is true, copyright does encompass the arts in the ordinary sense, and the creativity which goes with it. Yet it goes beyond that, and it is often commercially much more important outside the really artistic sphere. The most important thing is that we shouldn't ask the courts to decide what is art, and therefore creative and therefore protected, and to distinguish them from other forms of creativity which are not meant to be protected. It's quite questionable to require some kind of artistic novelty. For patents, there must be novelty. In copyright, emphatically there is not. You could deny vis-à-vis any kind of artist novelty even in the high arts, because you can say: you were influenced by that and that earlier artist. A complete *ex nihilo* creation never happens because you are influenced by who you learn and study with or from. The visual artists usually learn from the Old Masters, and in music this trend is even stronger, there is more reverence. In music the old masters were never questioned very much by the next generations. In other arts, artists may have said, 'What has been done in the past was all rubbish, give that up, produce something new.' In music, people would very clearly say that, for example, they have learned how to compose a string quartet particularly from Mozart, as Schoenberg did—and there is seemingly no similarity between Mozart's and Schoenberg's music. But when you listen to one and the other, if you are a musical person and understand the structure and 'grammar' of music, you notice that there are similarities. You could then hold that against the later composer and say: well, look here, you are actually not creative, not novel, it's been done 150 years before! So, in this regard I think that the law has to step out of this because it couldn't cope with that and would not have the necessary expertise. The idea of copyright protection is that it is mainly investment protection of some sort. On the Continent, in the authors' rights systems, however, they have a different protection philosophy compared to Britain, although the practical results are often very similar.

***CJLPA*: I agree. I feel that the law can't cope with judgments of aesthetic value being given to works. I think it has become even more difficult in the modern era, where digital methods provide creatives, to use a broad term, with so much scope. I have written for the Journal about filters being applied to images. How do we understand copyright in that context? Is that a new image? I fall on the side of, 'It can be, but we should use a "public" perspective.' I'm very interested in using a 'public' perspective to see whether an artist can still be found and given moral rights. I think sometimes the law supposes too much as to what an artist wants from their work, and can limit creativity. The artist should have those rights when necessary, but moral rights rather than economic rights. I think that distinguishes certain legal systems from each other. The UK has such a stance on economic rights, which doesn't quite understand creativity. Creativity is not the same as physical property, with which it is more about investment, and generally more commercial. Talking about the two systems—moving on to the second question—what do you think has been the most significant change in copyright law this century so far? Most would say this was *Infopaq*, which changed a lot, but in the UK it has changed very little, and judges have continued with the old standard. That said, there were some movements in the Temple Island case. Do you think there has actually been a fundamental change in copyright law this century?**

AR: If you ask French copyright lawyers they may say that actually *Infopaq* introduces quite a lot of the British approach to the concept of originality. So wherever you look, the others are supposedly guilty! You could say that *Infopaq* provides more of a civil law approach to originality, with its emphasis on having a choice that indicates the presence of 'creativity', authorial individuality that appears in the work. The stamp of the author as a result of the selection or arrangement, which goes back to an individual—that is a civil law approach, that is, an author's rights approach, that the author is protected with the work because the author's personality shines through the work. But what does that mean really? For example, you take a photograph from a certain angle. I take the photograph with the same motive from a different angle. This is my 'choice'. Look at the CJEU case of *Painer*,[3] a case which actually says exactly that. The subject matter was a portrait photograph. So one can take a photograph of you just in order to make sure that you are depicted [in] the photograph without any kind of artistic connotations or interests. Of course there are truly artistic photographs, also in the form of portrait photographs. But there's no doubt that the usual commonplace pictures taken can still be protected by copyright. This appears clearly from the cases of *Infopaq* and the following ones, such as *Painer*. If you have got a bit of a choice during the making, that is usually sufficient to confer creativity. This is exactly the approach in the *Feist Publications v Rural Telephone Service* case[4] in the United States, which is obviously not influenced by EU law and jurisprudence in any way. And this US case is really classical copyright thinking, so I cannot see that *Infopaq* has changed that much.

I didn't think of the *Infopaq* case really when I looked at possible significant changes in copyright law in this century. If you look at the twentieth century, it was actually the film being recognised as an independent work of copyright, and not as some version of a literary work or dramatic or artistic work. That was basically driven by technology. And that happened in the 1930s when countries for the first time started accepting films as copyright works in their own right. In the twenty-first century, it's digitisation, and gradually the Internet. For example, the making available [of] rights which were introduced by the WIPO copyright treaty [and] are no longer dependent on the idea of reproduction from the era of the printing press. That is only one example of these absolutely vital adaptations to new technology by copyright law. However, copyright is still behind. For example, blockchain technology may actually become very important for smart contracts, for copyright assignments and licences in the entertainment industry, and that is starting already as well. That, I think, may change a lot in the whole nature of copyright and the copyright business in general. In my opinion, *Infopaq* has not made a comparable change.

***CJLPA*: Digitisation has certainly been the huge shift. I was reading a book recently called *The Twittering Machine* about how much data now exists on Twitter. Could we claim copyright over our tweets? Are our tweets substantial enough to be copyrighted?**

AR: With all this new technology, you have to be quite careful whether the new technology really changes something in a conceptual way, or whether it's just a different medium for the old problems. If you read Aristotle on the Internet, it's still Aristotle. So it doesn't matter how it is actually rendered, whether it's on a parchment roll or whether it's on the Internet digitally. It's a literary work, irrespective of the technology that renders it. That doesn't

3 Case C-145/10 *Painer v Standard Verlags GmbH and Ors* [2013].
4 *Feist Publications v Rural Telephone Service* 499 US 340 [1991].

make any difference. However, for example, the film was a thing on its own, which is not really the same as we have had before, and we couldn't just take the existing concepts. It was something new. And I think the Internet has increased enormously the ability to actually 'reproduce', in a non-technical sense, but only in an electronic sense, without the need to construct a printing press as an engineer—that is, something physical. You visualise not through a physical act, but through the digital media, and that is probably something which asks for a development of further copyright concepts. The same applies to networks and so on.

Twitter could be asking for a new concept as well. The Twitter text itself, however, is probably just a traditional literary work. And it is substantial enough to actually warrant protection if you have enough individuality in your text, which you can have with your 280 characters maximum. Sometimes opening lines or opening sentences of novels can be so characteristic that even if the novel is 500 pages long, this snippet is still enough to actually warrant protection. For example, the first lines of Kafka's *Metamorphosis*, or the first lines of *Anna Karenina*, or the first two sentences of *Pride and Prejudice* would actually have been capable of being protected if copyright had not expired already. Yet they are really a minute part of the full texts. You could have protection as a literary work even on Twitter, so that is not a new concept.

***CJLPA*: The Internet makes everything much more accessible and opens gates to how things are shared. There is a question of how the infringement elements of our law deal with that, and how people utilise it—to their personal advantage, or to the detriment of creativity in itself. That moves us on quite usefully to question three. Do you think that copyright benefits creatives? Do you think it's been a system that's been helpful, or do you believe a different system other than copyright as we have it now would be more beneficial?**

AR: How useful would a different system be? Nobody has come up with a really different system, as far as I know. That's how the debate usually ends really. Copyright is not bad per se, even if you've got some sort of anarchic approach to it. Copyright is a liberal system. In Britain the Statute of Anne contained already a bit of the 'language of property', so copyright has actually been constructed as a property right for everyone and is therefore a right, not only a privilege. So theoretically, everyone is equal, which is an old liberal approach. The problem with the old liberal approach is that it assumes that everybody has the same chances, and so everybody will be successful. But of course in reality, this isn't so, because—and if we stay in the arts sector—as you know, the young artist turns up at a record company and is happy that they take him or her at all. There's no bargaining power whatsoever. The artist is theoretically protected by copyright as an author. And then the company may say, 'Fine, we actually produce your record, but you assign the copyright to us, please. And we pay a one-off flat fee.' Then the whole work becomes an instantaneous hit. But then the company would say, 'We do such projects with 20 others. Your hit must now pay for our investments into projects which never turned out as commercial successes. In this way we also support the arts.' So you have to decide who you ask. For some people copyright works very well. It may work for an established artist, but may not at all for a young artist. It certainly works quite well for the entertainment industries. They are happy, and of course they pay tax somewhere, which may be used as an argument to justify their business strategies. They do somehow support the arts. Not as much probably as they claim, but they do somehow, and for them copyright does work.

Then we've got the collecting societies, which is a good idea in principle, but they're not very transparent. Generally, there is a tendency that they're more for the benefit of the already established artists, who actually earn a lot, and disproportionately more than the little new ones, which is of course only indirectly a copyright issue. It is, rather, a regulatory issue. You have the collective management scheme as well, which makes it easier for collecting societies to operate on your behalf. But you need to have enough transparency for a satisfactory operation. There is a lot of art and music going on, for example, in African countries. Do they have collecting societies? Usually yes. Do they work? Do they actually enforce your rights if you've got them?

So all these things are not things where you can blame copyright directly. The copyright system is in a way an abstract system. What you do with it is a sociological and political question, and that can only indirectly correct copyright. In theory, the law says that you're protected, and class, social circumstances, and status are unimportant for your rights. In some ways, copyright is an example of this early liberalism. Yet in reality, you may have your rights but [may not be able to] enforce them because you do not have the money for a lawyer to represent you. You may not even know that you have certain rights, [or] how to enforce them at all. Matters become even more difficult if you want to introduce a paying public domain and some kind of basic income for artists. Ultimately, you need to decide: do you want to have free market capitalism, or a market fundamentalism, according to the prevalent neo-liberal approach, or do you want to have a more ordoliberal capitalism? How [do] you then deal with the method of distribution of these rights and the revenue? Copyright may benefit creative people, but it depends very much on the individual situation, for which both the law and the practice before the courts [are] totally silent, at least in the area of copyright. All people are meant to be equal, but we don't actually look at the real socio-economic situation.

***CJLPA*: Those rights don't necessarily map as they should onto society. Do you think 'property' is the correct term for copyrightable works? Should the courts stop trying to commodify works in the same way as actual tangible property? As we've discussed already, there is a significant difference between the two. Could there be a better term? Or do artworks necessarily occupy a weird middle ground, with elements of property but also a sort of otherness?**

AR: It probably has some otherness to it, but the issue is that the law clearly says it is a property right. That is said in section 1 of the UK Copyright Act.[5] It says that in France as well: 'Un droit de propriété incorporelle exclusif et opposable à tous'. And this is so, although we [the French] have the apparently antagonistic authors' system, compared to copyright. But in reality, there is not that much difference. There are fringe cases where there are differences, but in reality, all people want to make money, and that doesn't change with the legal system. So the law has to accommodate that, whichever way you actually construct it. Particularly in Western and Central Europe, concepts of property go back to Roman law, which English law theoretically has never adopted, but especially in commercial law it has applied similar concepts. The idea is a kind of division of the world into persons and things, so you have got subjects and objects. And that is how property is understood really: an object in relation to a person, or more properly, a relationship between persons in respect of things or objects. The normative world of the law looks at the physical world and tries to understand it. And it conceptualises

5 Copyright, Designs and Patents Act 1998 s 1.

everything it 'sees' as persons and things, and these things can be physical, or they are intangible. And this is the same if you create something, an object, and quite often it is even a physical object because it is a sculpture. With music, it becomes tricky. But if you've got a sculpture, then you've got something physical. But what do you do with this creation? You would say it's property because you've been given exclusive rights, exclusively allocated to the maker, which we call copyright. And what is that, if it's not a property right? Of course, the copyright—intangible property—refers to the artistic work the sculpture embodies, not the physical, carved stone which is subjected to a separate property right—tangible property. As an author, you can also transfer the economic rights within the copyright, which are instances of the property right, because transferability is in principle an indication that there is a property right.

In Germany, the moral rights as personal rights are much intertwined with the economic rights. And as you can't give away your personal moral rights, which would be contrary to personal rights, you can't give away your economic rights either. And therefore you have a different conception in Germany, which they call incorporeal goods. But these are exclusive, and evidently have got economic value. In effect, what else is that, if not property? So we are back to the familiar legal conceptualisation. The law says there are persons and things, but that doesn't actually mean that much, except for conceptualising parts of the world for commercial law. If you make an X-ray of a person, that does not make it a complete photograph, although it's that person. [It's] not everything. It's a very limited, reduced picture for certain purposes. And so is the idea of property: it does not harm as such, it depends what you do with it.

For example, if you have a house, and it belongs to you, you can't just burn it down, although it's yours. So even if you're a property owner, you do not have totally unlimited property rights. However, there is some difference in the Anglo-Saxon world and in the continental European world. Continental European legal systems generally have the idea that ownership rights are not completely without any limitations. You have some duties as well, probably to the general public and to the public domain, although the practical applications of this idea are very vague. Another important limitation, both in the copyright and the authors' rights [worlds], is that copyright ends at some point, while otherwise ownership rights usually last forever—not necessarily in English law, but in the continental European and Roman law-based systems [also in Scotland]. Now, the problem is not a great one when you've got an apple. It rots after four weeks, so you may have your ownership right forever because the object to which it refers decays and disappears soon anyway. However, purely legal concepts, such as a copyright, could last forever, in theory. But the ownership right gets extinguished and the work passes into the public domain by law. That is also an indication that the property in copyright works is limited. It is necessary that this concept and its limits are properly understood, also in the context of commodification.

***CJLPA*: That's helped me conceptualise it. I'd like to move on to a question that you can't really avoid at the moment. Do you think that the UK courts will take Brexit as an opportunity to reassess copyright law and perhaps take it in a different direction? Or do you think we will continue with the status quo, the doctrine of skill and labour?**

AR: Well, the doctrine of skill and labour is actually something which existed before Britain joined the European Union. It carried on during Britain having been part of the European Union. And in my opinion, as you say, it hasn't actually been significantly changed by *Infopaq*, and now it probably carries on after departure from the European Union. Why would the British all of a sudden invent something new if there has been a functioning British concept all along anyway? And of course, European Union legislation has been influenced by the UK, although this would not have been emphasised by the official pro-Brexit propaganda. For example, the whole idea that you can protect computer programs as literary works is essentially a kind of borrowing from the British skill and labour doctrine, because labour, judgment, and investment, like in [the] form of two years' programming, is sufficient for originality in copyright. Therefore, in 'EU language', it is protected because it is your own intellectual creation. *Infopaq* only gives flesh to the bones of this statutory definition of 'own intellectual creation', which by itself boils down to skill and labour with the addition of a sort of creativity defined as choice that serves as a trace of some authorial personality. This idea could be seen as quite copyright-based and US American. And from this idea also follows an application of the idea–expression dichotomy. If you ultimately have no choice whatsoever and you can render the idea in one form of expression only, then the idea and the expression 'merge', the so-called 'merger doctrine'. In such a case you don't get copyright protection. That's also American thinking. It has moved into the European Union, for example with the *Bezpečnostní softwarová* case[6] of the ECJ.

I think that case law in the UK won't change much in the near future after Brexit. There is also the problem that not many people have the money to sue, and you need to have a case going to the higher courts—the Court of Appeal or the Supreme Court—to have an authoritative pronouncement [on] what the relationship between British originality, as skill and labour, and European originality, as 'own intellectual creation', will be in the future. But artists usually have not enough money for that. So judgments would probably have to be prompted by record companies or the entertainment industries, and large software companies which have the means to pursue legal action. The subject matter of such cases will be commercially relevant works not 'high art' anyway. The *Sawkins* case was really an exception. Normally the cases deal with artistically pretty trivial things, but these tend to be interesting from a commercial point of view and are worth risking a lawsuit [for]. And the present established definition of originality is probably not a major concern for the entertainment and copyright industries. If people don't go to court, they won't trigger new precedents, and a change of the case law won't happen. Why would a judge depart from established case law for no particular reason? And as far as the copyright statute is concerned, I think the British government is very busy with many other things now, and substantial copyright amendments will probably not be at the forefront of their attention.

***CJLPA*: We are of course in a very interesting time. I'm sure the British government is not particularly concerned with, say, what a musician's copyright is for a certain recording. However, a lot of our discussion has been about politics, and how politics and elements of economic thought have played into our understanding of the law. What sort of dogma might prompt a change in copyright law and statute? Is there some sort of political thought out there that could take over and radically change the precedent?**

AR: I don't think that there are many people who are really specialised in the various government agencies for making an overhaul of the copyright system. There is a very interesting opinion by Mr Justice

6 Case C-393/09 *Bezpečnostní softwarová asociace—Svaz softwarové ochrany v Ministerstvo kultury* [2011] FSR 18.

Arnold, now Arnold LJ, who proposed a new Copyright Act in a learned article.[7] He said we should pass a new Copyright Act, but that was in 2014 before Brexit. He said that there have been so many amendments since 1988, when the present Act was passed, also because of the implementation of the EU directives, and all that was not particularly well done, and so the whole Act is pretty messy. Now the EU supposedly doesn't bother us anymore, but of course the current Copyright Act will linger on with the EU law embodied in it. In the near future, not much will presumably happen. I would not even be surprised if the UK will effectively emulate future copyright directives of the EU for a while, without of course [saying so], because that's not good for the official narrative that freedom from the EU means taking back control. In fact, the UK may self-align in order not to build up too many barriers to the market.

In order to achieve a fundamental reform of copyright, there have to be creative people who are able to invent something new. I have to say that Brexit was good at destroying, but the Brexiteers didn't actually come up with anything new. They tore down the house they lived in but they didn't actually say or know what else would be there instead. And then we had this strange situation where the UK had a free trade agreement, the most sophisticated one the UK could possibly have in the world, which was the European Union. But that had to be discarded. And then the UK wants to have a free trade agreement with the EU again, somehow after having given up the previous one. But of course, under these circumstances it becomes quite difficult, if the UK wanted to establish a really antagonistic copyright law in whichever way. It would make desired free trade more difficult, and the changes would need really creative people in politics and the legislature. And I have not seen that, neither in the Conservative party, nor in the Labour party. And to be honest, I don't think that anyone thinks along the lines of significant change for the sake of a few artists, as ultimately, as we've seen in the 'corona crisis', assisting the arts was totally low down in the list of priorities. I don't think that there is much pressure from anywhere, especially from the powerful entertainment industries, which actually would force the government to start a reform. They may do some consolidation of the Act or something like that. But I don't think that a new Act will come in the near future. Even if a new Act did come, it would rather be a restatement, not a sea change. It would not contain a fundamental change of copyright at all. There are also quite a lot of external limitations by international treaties, especially the TRIPS Agreement and the Berne Convention, which remain applicable to the UK after Brexit. And that also gives a framework which prevents from simply inventing something completely different. I think in the near future the UK will just carry on quietly without any fundamental conceptual changes.

Of course, Brexit is not good for the arts because any kind of nationalism is never advantageous for the arts. The same is true of the sciences, which are international by nature. The younger artists may well pack up and go to the US or the Continent, for example Berlin. Berlin is much cheaper to live in than London and has a flourishing big art scene. You can also go to Paris, although Paris is more expensive. But there is no doubt that Paris has always been more the European capital of the arts than even London, which is perhaps the European capital of arts business. And Berlin and Paris are in the European Union, and a door to the world. The officially imposed insular British way at the moment stands against the international development of the arts. But we'll see how long that really lasts. However, at the moment there is a disincentive for festival artists coming here. But touring artists were always a footnote in any UK–EU negotiations. The arts are generally seen as superfluous. They are a bit of a luxury. Of course, in London the art scene won't disappear. But you need to support the arts, so that they stay. If you think, as a struggling visual artist, that you survive somehow better elsewhere, you won't necessarily bother with London any more under the present circumstances. And that means that any pressure on the government to change the copyright law in favour of artists probably reduces as well, because there will be fewer artists and smaller pressure groups. I think that is a quite realistic scenario for the foreseeable future.

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7 Richard Arnold, 'The need for a new Copyright Act: a case study in law reform: The Herchel Smith Intellectual Property Lecture 2014' (2015) 5(2) Queen Mary Journal of Intellectual Property 110.