



Copyright Law and Academic Libraries: From Theory to Practice

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abstract: A theoretical framework can offer an important means for understanding and delineating the complex issues of copyright law and its ramifications facing researchers and academic libraries. This study draws lessons from the literature on how copyright theories can inform practice in libraries. It describes strengths and weaknesses in each of the current theories, with none providing the needed philosophical clarity to address all stakeholder concerns. Promoting copyright literacy on campus and instituting such measures as classroom guidelines, a copyright compliance policy, a cross-departmental team to manage copyright, and library websites that address copyright issues may ease the frustrations in copyright practice.

Introduction

Copyright is the branch of intellectual property (IP) law that deals with access to information. Copyright industries—that is, businesses such as publishing, whose primary purpose is to create, produce, distribute, or exhibit copyrighted materials—have made significant contributions to the economies of many nations and to the cultural expression and heritage of many societies.¹ Between 1990 and 2011, copyright-intensive industries grew by 46.3 percent and contributed 5.1 million jobs to the United States economy, outpacing many other industries.² In Ghana, the home country of one of this study's authors, copyright industries in 2016 accounted for 4.02 percent of the gross domestic product, generated nearly \$2.24 million U.S. dollars, and employed 4.77 percent of the country's total workforce.³

Copyright is considered a driving force of the knowledge economy and receives major attention in developed countries.⁴ For example, in 2013, the United Kingdom's Parliament, with support from an All Party Parliamentary IP Group, passed the Intellec-

tual Property Bill to modernize the country's IP system. In 2014, the British government committed £3.5 million to fund an educational campaign to explain the importance of copyright to its citizens and to educate them on the boundaries of copyright laws and policies.⁵ In the United States, a nonprofit, nonpartisan group called the Copyright Alliance works toward similar goals.⁶

Copyright covers the claims that authors, composers, artists, and other creators have to their works. Copyright laws grant to rights holders, for a limited period, the power to authorize or impose restrictions on others for certain uses of their creations.⁷ Several

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studies have explored the claims of rights holders compared to those of information users, especially users in higher education, and the library's role in ensuring a balance of rights in the use of knowledge goods. Communication technology, especially the Internet, has made it easier than ever for people to access information, thus strengthening the contradiction between protecting copyright and encouraging public access to knowledge.⁸

A theoretical framework provides an important means for understanding copyright law and its ramifications for academic

libraries. Such a framework is defined as "a structure that guides research by relying on a formal theory . . . constructed by using an established, coherent explanation of certain phenomena and relationships."⁹

A theoretical framework forms the basis from which researchers derive the problem statement, purpose, significance, and research questions in any study. It also provides a foundation for reviewing the literature to determine what has previously been done with regard to the topic in question, and most importantly, the methods and analysis of the research.¹⁰

Considerations about Copyright

Many social, cultural, and other considerations enter the discussion of copyright. Lior Zemer stresses the importance of arriving at the right balance between rights holders' privileges and the public interest.¹¹ Copyright law endeavors to achieve equity among three groups of stakeholders: the creators of content, or the rights holders—authors, scriptwriters, and others; the producers of the created works, such as publishers, movie producers, or performers; and those who use the material, or society in general.¹² Thus, the expectation is that copyright law provides equal protection for eligible works in virtually all industries as well as upholds the legitimate rights of users. Copyright laws therefore seek to achieve fair treatment for creators and producers of works, for users, and for societal interests. By so doing, copyright laws contribute to a country's socio-economic development.¹³



Nearly all creators of copyrighted material desire total control over what they create; thus, they seek strong protection over their works. They want “recognition, respect and remuneration.”¹⁴ Also, to recover the investments made in commercialized copyrighted works, producers of those works seek enforceable protection for them. Producers, much like creators, also favor strong protection against users whose interests are “access to, and affordability of scientific and cultural technology.”¹⁵ IP or copyright consumers, on the other hand, look for ways to circumvent unwarranted restrictions on the use of the IP or copyright concerned. Consumers prefer that if protection is necessary, it should involve minimal or no cost to them. Copyright policies and laws must balance the competing interests of these stakeholders within a legally and economically viable policy framework.¹⁶

In his article “Competing Views of Intellectual ‘Property,’” Phil Davis writes, “Theories are like glasses.”¹⁷ When people wear them, they look at things differently. This is especially true in the case of IP or copyright, where consensus is a necessity. Consensus building is not an easy task, however: the various stakeholders wear different glasses, making it difficult for all to see or understand issues the same way. Zemer, however, argues that at the heart of all theoretical approaches to the copyright debate is “public interest.”¹⁸ Each approach therefore endorses, directly or indirectly, a limited conception of property for copyrighted works and does not grant absolute privileges to rights holders.¹⁹

Theoretical Approaches to IP Rights

According to William Fisher, an expert on property law, copyright theories revolve around four theoretical approaches to IP rights. These are: (1) utilitarianism, (2) the labor theory, (3) the personhood theory, and (4) the social planning theory.²⁰ Fisher considers these theories valuable but admits that they are not holistic and may not cover all there is to know about IP. Notwithstanding these misgivings, Fisher contends that in-depth conversations among the participants in the lawmaking process—that is, lobbyists, legislators, scholars, judges, litigants, and the public at large—may address the weaknesses within the existing theories.²¹

Utilitarianism

The utilitarian approach focuses on the interests of society as a whole from an economic standpoint. Neil Wilkof describes this as achieving the principle of “the greatest good for the greatest number.”²² The utilitarian perspective conceives copyright as a motivating factor for authors to invest their resources, such as intellectual effort, time, and money, in the production of works of creative expression, such as entertainment or learning materials for the enjoyment and benefit of the public.

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port it offers to their business models, helping them to generate financial returns so that they can retain part as profit and reinvest the remainder to produce additional works. Simply put, copyright protection motivates creators to be innovative in the production of their ideas since they receive rewards for their creativity. Without such rewards, creators might not invest their resources merely to let others use what they have made. Thus, according to Jeanne Fromer, a world without copyright protection is a world where there would either be fewer learning materials or materials of lower quality.²³

The underlying principle of the utilitarian theory is that intellectual products, classified as “public goods,” are “nonrivalrous” (that is, they are easily replicated and can be used by an unlimited number of people) and “nonexcludable” (that is, one person enjoying a product does not prevent another person from taking pleasure in the same product).²⁴ Pushing this idea to its logical conclusion presents the danger that if works are made freely available, creators of products will be denied the ability to redeem their “costs of expression,” that is, the time and effort invested in creating the work, as well as the costs of production, including the time and energy expended in negotiating with publishers. Making copyrighted works freely available also means that people duplicating copyrighted information will easily outcompete the creators and producers of original material by offering similar products at cutthroat prices because of their lower production costs. Creators of knowledge goods, if they become aware of the loss in revenue, may shy away from further creating valuable IP goods.²⁵

Utilitarians believe that IP rights and copyright foster innovation, with “the caveat that such rights are limited in duration as a means to balance the social welfare loss of

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monopoly exploitation.”²⁶ According to utilitarians, copyright legislation incentivizes authors to continue writing. Stephan Gavrilesco states, however, that the need of writers to receive incentives for their creations should be balanced with society’s demand for widespread dissemination of knowledge goods,²⁷ which is the basic mission of libraries. He calls for policy makers to look for the most appropriate way to balance the privileges of rights holders with the interests of the public. The utilitarian theory thus requires that lawmakers or policy makers strike an optimal balance between user rights, the entitlement of rights holders to compensation, which stimulates further inventions,

creations, and works of art, and the propensity of such rights to restrict the public or societal enjoyment of those works.²⁸

The utilitarian approach, also known as the welfare theory, emphasizes the collective good.²⁹ A conundrum raised by this approach involves the question of how strictly librarians and their patrons should observe copyright laws during the dissemination and utilization of library information. As library materials are made freely available to patrons, the collective good of the society is advanced. If large amounts of information are used without the requisite compensation, however, creators are denied the opportunity to profit from their creation.

Yochai Benkler criticizes the utilitarian theory on the grounds that monetary incentives are not the only factor influencing the production of copyrighted materials.³⁰ The utilitarian theory fails to consider nonmonetary rewards, such as academic tenure or the reputation enjoyed by artistic and scientific innovators, as a motivation for the creation of knowledge goods. Benkler further argues that the humanitarian purposes of open source developers also promote creation of informational and cultural products.³¹ The nonmonetary motives confuse the issue of the importance of financial rewards to creators.³²

The Labor Theory

The labor theory is based on the proposition that “a person who labors upon resources that are either not owned or ‘held in common’ has a natural property right to the fruits of his or her efforts—and that the state has a duty to respect and enforce that natural right.”³³ This theory is premised on the writings of John Locke, an English philosopher of the 1600s, and is sometimes referred to as the Lockean approach to copyright. Locke’s belief is that when an individual has exerted labor to transform raw materials into a finished product, that person has a natural right to the finished product with its enhanced value.³⁴

This approach, based on the premise that copyright law should give creators of knowledge goods their due, is also referred to as the fairness theory. That is, hard work must be rewarded, and creators must have control over the fruits of their labor. This belief, however, raises the question of why an individual should gain entitlement to a resource “held in common” just by transforming it. According to Wilkof, the moral question arising from this theory is that posed by the American philosopher Robert Nozick: “If I pour my can of tomato juice into the ocean, do I own the ocean?”³⁵

The Lockean approach poses challenges for both librarians and library patrons. Although an individual creator deserves to be compensated, that individual has only added labor to a resource that is “held in common.” As such, that resource must be made available to other members of the society even while the creator must be rewarded for the effort and resources that have gone into the creation of that knowledge good.

The Personhood Theory

US Legal, Inc., an online publisher that offers legal information, defines the personhood theory as the principle of IP that gives recognition to the individual inventor, author, or artist’s point of view above that of society. To the personhood or personality theory, individual expression is a form of self-actualization that gives creators incontrovertible moral rights to their creations. The personality theory proposes that the legal system should grant to creators or artists the authority to control the use or modification of their works. The underlying principle is that “injuries” to these works inflict corresponding harm on the originators.³⁶ US Legal states further that giving creators this power is crucial to providing “a general social environment” for them to establish and maintain their identities.³⁷

The personality theory is informed by the writings of the German philosopher Georg Wilhelm Friedrich Hegel. For Hegel, in the acquisition of private property, an individual’s will mixes with an external object. People laboring on a plot of land deserve

to be rewarded for the resources they have expended on that land.³⁸ This theory is based on the premise that some fundamental human needs are met through private property rights, thus requiring that policy makers enable people to fulfill those needs. Intellectual property rights and copyright laws may therefore be justified since they prevent others from appropriating or modifying artifacts that bear the personality of the author. Moreover, IP or copyright rights create economic and social conditions favorable to creativity.³⁹ Thus, the personality approach posits that authors' works are expressions of both their ideas and their personalities.⁴⁰ Unlike the utilitarian theory, which focuses on the fruits of labor, the personality theory centers on the work as an extension of the creator's self.

According to Fisher, the personality theory justifies property rights "when and only when they would promote human flourishing by protecting or fostering fundamental human needs or interests."⁴¹ This theory strongly supports those aspects of copyright law known as "moral rights."⁴² Moral rights include people's right to receive credit for their creation and to prevent others from mutilating or destroying the same.⁴³

Peter Drahos criticizes the Hegelian theory in that it fails to justify the differentiation between physical objects and intellectual works.⁴⁴ It thus neglects to address the question of why the embodiment of an individual's personality in creative works should merit special treatment.

The Social Planning Theory

Another theory proposed by Fisher is known as the social planning theory.⁴⁵ Its roots are embedded in the proposition that property rights in general (and in particular copyright holders' rights) should be fashioned to "foster the achievement of a just and attractive culture."⁴⁶ The crux of this theory is that social and political institutions should be organized to facilitate human flourishing.

According to Jessica Meindertsma, the social planning theory, in encouraging works for the common good of humankind, tends to be paternalistic, making decisions for other people rather than letting them take responsibility for their own lives.⁴⁷ Like the welfare theory, this idea proposes that the law prompt individuals to conduct themselves in

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ways that will foster the improvement of society. It posits that maintaining a strong civic culture requires a balanced social and institutional regime governing IP or copyright.⁴⁸

Many reformers of copyright seek to identify and alleviate limitations on the use of copyrighted materials for educational purposes. Proponents of the social planning theory thus advocate for a "less rigid set of IP laws, elite patronage and cultural hierarchy," with the view to facilitating "expansive social interaction and cultural exchange." They do so because "copyright promotes expression, but copyrightable expressions limit subsequent democratic and expressive discourse."⁴⁹

A major criticism of the social planning theory is that political philosophers hotly debate how goods, services, and responsibilities should be shared among members



of society.⁵⁰ The theory also has not adequately addressed the question of how much copyright protection is sufficient.⁵¹ However, Gregory Alexander and Eduardo Peñalver indicate that the social planning theory allows for a challenge and reevaluation of the narrow perspective of utilitarianism by employing a “pluralistic conception of human well-being.”⁵²

Additional Theories

Zemer identifies two other approaches or theories: traditional proprietorship and authorial constructionism.⁵³

Traditional Proprietorship

Traditional proprietorship holds to a set of rights associated with the ability to use, to prohibit others from using or possessing, and to transfer tangible property one owns “as a gift, by sale or bequest, including the traditional principles of trespass and encroachment, into one’s private dominion.”⁵⁴ In proprietorship, property rights rank higher than other kinds of rights and interests because “a state cannot grow rich except by an inviolable respect for property.”⁵⁵ Traditional proprietorship reinforces the exclusive rights of authors to copyrighted materials, which hinders free use of information in academic libraries.

Traditional proprietorship, however, is not an independent approach to copyright. It rather seeks to link all the approaches to secure for rights holders the relevant recognition and compensation for the authorial and artistic efforts that might have gone into the creation of a work.⁵⁶

Authorial Constructionism

Authorial constructionism hinges on the fact that copyrighted entities are products of collective contributions and not stand-alones. Proponents of authorial constructionism believe that authors are mere vessels through which many influences and experiences flow, and so property from the copyright system must be seen from a social perspective.⁵⁷ Martha Woodmansee and Peter Jaszi corroborate this view when they argue that all forms of writing today are collaborative, whether in business, industry, law, government, science, or the social sciences.⁵⁸ In other words, authors can create only because they themselves benefited from contributions from various sources in their works, which are thus “socially constructed and historically contingent.”⁵⁹

The idea behind authorial constructionism is supported by many experts, such as the legal scholar Zechariah Chaffee Jr., who remarks, “The world goes ahead because each of us builds on the work of our predecessors.”⁶⁰ Jessica Litman also argues that there is no ultimate originality because creative art is dependent on the works of others and “this is the essence of authorship.”⁶¹ According to Wendy Gordon, artists receive “a tradition and [a] world they have not made.”⁶² Carys Craig, a professor of intellectual property law, argues that since intellectual works are products of additive collective labor, they ought to be jointly owned.⁶³ This idea therefore supports the public or societal interests enshrined in copyright laws in most countries, which grant exceptions to information users in academic libraries and other educational institutions.

Zemer and Roberta Kwall, however, argue that this collaborative approach to copyright is excessively individualistic because it treats authors or groups of authors in their individual capacity, not as members of a larger social group.⁶⁴ The right of the group to copyright ownership is not questioned under this theory. Zemer and Kwall declare that authors' creations result from their interaction with fellow authors, rather than with the society at large. However, Zemer and Christopher Buccafusco recognize the fundamental need to allocate to authors property rights with a view to maintaining a stable social and cultural system.⁶⁵ Granting such rights, they argue, will ensure that authors do not lose their rewards. Woodmansee and Jaszi further argue that a romantic vision of the author as a solitary artistic genius undermines the nature of intellectual creation as a collaborative activity.⁶⁶ Woodmansee and Jaszi thus question the modern view of authorship and its origin, but they do not challenge the monopoly position of authors in the copyright creation process.

The collaborative authorship concept has, however, been criticized by Kwall and Buccafusco.⁶⁷ Kwall, on the one hand, finds fault with the concept at two levels. First, it fails to provide a sufficient legal framework to handle joint authorship, and second, the public does not make authorial decisions about any particular work.⁶⁸ On the other hand,

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Buccafusco, citing copyright expert David Nimmer, writes, "Copyright law requires authors."⁶⁹ Copyright law recognizes an author as someone who has the intention "to produce mental effects in an audience."⁷⁰ Buccafusco further argues that copyright law thus requires a theory of authorship consistent with the broader legal principle of optimizing creative production. The law must balance the interests of the creators with those of the public or society, and it must not "kill authorship" as the collaborative authorship concept might, thus tilting the balance in favor of information consumers.

Zemer and Conor Shevlin also say that none of the theories provides the needed philosophical clarity to address the issues of imbalance and that there are no distinct boundaries between the theories.⁷¹ Copyright scholars have not agreed on any single theory but rather seem to combine the various theoretical drifts to develop new themes. Zemer therefore proposes that any acceptable theory should be pluralistic in its foundations.⁷²

How Copyright Impacts Academic Libraries

According to the Berkman Center for Internet and Society (now the Berkman Klein Center for Internet and Society) at Harvard Law School, a research institution that

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focuses on Internet issues, copyright law can help foster a culture that supports a strong educational system open to everyone and can increase access to knowledge through a robust and universally accessible library system.⁷³ Depending on how copyright law is shaped, it can also impair progress in artistic



innovation, discourage user modifications of cultural goods, frustrate the efforts of teachers to design and deliver pedagogically sound materials, and make the operations of libraries more costly and difficult. Thus, the effect of copyright law on academic libraries greatly depends on how the law is formulated and applied.

Libraries have the mission to provide free access to information without compromising the rights of creators or owners of the information. Libraries thus exist to promote the public interests in information use combined with responsibility for managing copyright from the rights holders' perspective. Legal scholars and the courts widely agree that the main purpose of copyright is to incentivize authors and creators to produce and distribute creative works, which is the basic tenet of the utilitarian theory. The utilitarian theory holds that copyright law should maximize social welfare from an economic perspective.

An underlying premise of the utilitarian theory is that copying costs less than initial creation. Without laws regulating reproduction, consumers would copy works and inventions rather than purchase them, which would deny creators the incentives they need to engage in further creation. To the utilitarian theory, exclusivity in copyright, which allows creators to charge a fee for their works, recoup expenses,

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and make a profit, provides an incentive to create public goods by spreading the cost of production among multiple potential purchasers.⁷⁴ This principle thus supports the collective management of copyrighted materials.

As libraries make their materials freely available to patrons, they promote the collective good of society. Making large amounts of information freely available without the requisite compensation, however, deprives creators of the opportunity to profit from their creation. Thus, the utilitarian theory advocates for a balance between the potential incentive benefit of exclusivity and the possible drawback of curtailed enjoyment or use of works.⁷⁵

The labor theory regards all information in the world as part of the commons, the cultural and natural resources that all members of society hold in common. One may only remove information from the commons by improving upon it through labor, thus upholding the tenet of copyright law that authors or creators deserve exclusive rights to their creations. However, two crucial provisions of the Lockean labor theory are that: (1) the products of labor must remain available to the commons if removing them would not leave "enough and as good" in common for others; and (2) property should not be wasted.⁷⁶

Thus, the Lockean labor theory supports exclusive ownership of intellectual creations by those who labor upon them, but only when "enough and as good" remains for others and when exclusivity would not result in wastage. Combining these principles gives support both to exclusive intellectual property rights and a robust public domain, and justifies limits on protection, such as the eventual expiration of copyright exclusivity.⁷⁷ It also justifies the right of noncommercial libraries or archives to make copies of

copyright-protected materials to replace or preserve those that have been destroyed or lost. This copying will forestall such knowledge goods becoming lost to future generations through “wastage.”

Wastage is also prevented by the current trends in copyright administration. United States copyright law, for example, promotes the safeguarding of knowledge goods by removing all limits on preservation of materials in the collection of a library or other

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educational institution. It replaces a former three-copy limit with a “reasonably necessary” standard, thereby allowing the making of many more copies.⁷⁸ D. R. Jones points out, however, that many e-resource licensing agreements have negative long-term effects because they hamper the ability of libraries to preserve information and jeopardize the

availability of works for future research needs. Publishers might withdraw certain works from library subscriptions, and many licenses provide that a library loses all access to the materials, including back issues, at the expiration of the subscription.⁷⁹

With the emphasis on identifying and alleviating limitations on the use of copyrighted materials for educational purposes,⁸⁰ the social planning theory gives room for exceptions for libraries. Excluded, for example, are photocopying under certain circumstances; interlibrary loan; and three related principles called fair use, fair dealing, and fair practice, which involve use of a work for commentary, news reporting, teaching, research, or similar purposes. The exceptions are, however, generally “specific as to the types of users, types of uses, and types of works that qualify for the safe harbors they provide.”⁸¹ Librarians must therefore acquaint themselves of the boundaries of each exception provision within their jurisdiction.

Jones⁸² states that, in the United States, the 1976 Copyright Act provides for library lending and copying, including selling and lending books that the library owns and photocopying materials.⁸² Photocopying under interlibrary lending is also permitted under the rules put together by the National Commission on New Technological Uses of Copyrighted Works (CONTU) called the Guidelines on Photocopying under Interlibrary Loan Arrangements. These guidelines provide that a “library, having made five requests . . . can evaluate any additional requests [and] determine that the requests indicate that the library should obtain a subscription or pay a fee for single requests. Alternatively, the library could determine that the additional request does not trigger a need to subscribe or pay.”

Though the 1976 Copyright Act codifies the fair use doctrine under Section 107, Jones reports that academic research libraries rarely consider fair use when making interlibrary loan decisions but rather choose to pay fees.⁸³ Jones thus advises research librarians to “consider their options each time they make a request rather than automatically paying a license fee.” She adds that though “it may [sometimes] seem easier to pay than to make an evaluation . . . librarians should not be lured by convenience into simply



making payments without any evaluation.” According to James Gibson, “If a rights-holder . . . routinely issues licenses for a given use, then copyright law views that use as properly falling within the rights-holder’s control . . . The practice of licensing within gray areas eventually makes those areas less gray, as the licensing itself becomes the proof that the entitlement covers the use.”⁸⁴ Academic libraries everywhere might profit if academic librarians did not pay license fees in haste but instead took time to evaluate their options.

As indicated by Elizabeth Rosenblatt a premise of the personality theory of copyright is that “the creation and control of intellectual property is valuable for self-actualization, for personal expression, and for dignity and recognition as an individual person.”

Controlling one’s creation is important to human well-being.⁸⁵ Thus, society should grant to authors inalienable rights to protect their knowledge goods against changes, to be publicly identified as the creator, and to be recognized as having an exclusive right to publish the work. The personhood theory of copyright therefore forbids reprinting without the express permission of the creator.

Alin Speriusi-Vlad, however, argues that a focus on the interest of authors shifts the legal protection of copyrighted materials from its initial purpose and instead impedes the development of society.⁸⁶ The right of creators to have their interest defended should therefore be modified for the development of society. Prioritizing the interest of authors over societal progress may obstruct access to information by ascribing to authors prerogatives to refuse permission to use information. The focus on the interest of authors therefore further strengthens the imbalance in the administration of copyright law. To foster a balance in stakeholder rights, academic librarians may advocate for copyright flexibilities that guard information use against two extremes that are equally prejudicial: first, depriving creators and innovators of justifiable rewards for their ingenuity and labor; and second, slowing society’s progress in the arts and sciences by stringent copyright laws.⁸⁷

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Navigating Copyright Rules

To ensure that the public’s interests and the constitutional rights of users and creators are upheld, Caroline Ncube and Peter Drahos have proposed an instrumentalist worldview.⁸⁸ This proposition rejects granting eminence to property rights over all other rights. Instead, it advocates for property rights that serve moral values and seek the “improvement of human conditions and experience.”⁸⁹ This instrumentalist worldview stands in direct opposition to proprietarianism and universalism, which prioritize the property rights of creators or copyright owners over users’ rights or societal interests.

The public interest approach to IP or copyright reinforces the “sense of community theory,” which postulates that all human beings belong to communities that provide benefits and responsibilities.⁹⁰ For example, the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) declares that

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

TRIPS also provides that member countries may adopt measures to promote the public interest in sectors that are vital to the country's socioeconomic and technological development. These measures must agree, however, with the provisions of the TRIPS agreement.⁹¹

According to Ncube, copyright exceptions and limitations, by allowing users to utilize copyrighted works without permission from the rights holders, serve as reminders

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ers that copyright is granted by society with a view to deriving cultural and scientific benefits from it.⁹² This philosophy underlies nearly all copyright laws.

Olav Stokkmo, however, warns, "Free may be costly."⁹³ He goes on to state, "In most circumstances, there is a huge difference between free and cheap. Copyright is no different. 'Free' would denote usages under an exception to exclusive

rights granted to rightsholders by legislation, without payment to those rightsholders." Stokkmo therefore urges caution in the interpretation and application of the law. Some authorities in higher education institutions, however, believe that they can rely on the exceptions and limitations clause in copyright law to meet the information needs of their patrons.⁹⁴ In this regard, Stokkmo reports that the Canadian Copyright Act was modified in 2012 with the introduction of new wording on exceptions and limitations. Canadian institutions interpreted these changes to mean that the law allowed broad use of copyrighted works without prior authorization or payment to the rights holders. This revision resulted in students buying course materials "for nearly double the price" compared to the previous year. The cost jumped after the University of Toronto cancelled its contract with Access Copyright, the copyright licensing organization that held the right to

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reproduce and distribute the materials. To Stokkmo, "the alternative to this false 'free' use is affordable legal access and usages. Collective management of rights is about easy ways of obtaining authorization to legally use published works protected by copyright at an affordable price."⁹⁵

Unfortunately, some librarians are under the erroneous impression that once a license is obtained, then the information can be shared freely. Although a higher education institution has a license from the Copyright Licensing Agency to copy and reuse extracts

of text and images from copyright-protected materials, the license has limitations. (The Copyright Licensing Agency is an organization in the United Kingdom that collects fees from businesses, universities, and other groups to reproduce copyrighted works and distributes the money it collects to the copyright holders). For example, the agency states, "Copies made for students in connection with a Course of Study are subject to specific conditions and reporting requirements."⁹⁶



Copyright Clearance Center, a company in the United States that provides collective licensing services for corporate and academic users of copyrighted materials, takes a similar position. It points out, however, that many users fail to understand the terms of their licenses. The center explains, "When content is paid for, restrictions are more obvious to respondents: 68 percent of executives surveyed believe that it is okay to share free digital or print information with others within their organization and 64 percent believe it is okay to share paid digital or print information. It usually isn't."⁹⁷

The Berkman Center for Internet and Society and Electronic Information for Libraries (EIFL), a network of library consortia in Africa, Asia, and Europe, describe the wide variation in license terms:

Licensors of online journals and electronic databases vary widely in their flexibility regarding fee arrangements . . . A subscription could include unlimited use of the licensor's materials, limited use for particular purpose, a pay-per-use arrangement, or a combination of these. Pay-per-use arrangements might set a fee for each log-on access, each time a user searches for content, or might allow unlimited access but charge users or subscribing institutions for each download.⁹⁸

To avoid copyright infringement, librarians must keep abreast of the terms and conditions in each copyright license agreement when they seek to share information with library patrons.

The Stanford Intellectual Property Exchange (SIPX), a novel system piloted by Stanford University in Stanford, California, may be one practical way to ease the frustrations in copyright compliance. SIPX facilitates legal access to copyrighted works and makes sure users observe the terms of each licensing agreement.⁹⁹

The complexities and ambiguities in copyright laws, as well as their cross-departmental nature, require that higher education institutions form copyright teams or working groups to ensure the laws are followed. Such teams, according to Jennifer Duncan, Susanne Clement, and Betty Rozum, should include "expertise in areas such as digital collections, institutional repositories, electronic reserves, authors' rights, fair use, the TEACH [Technology, Education and Copyright Harmonization] Act, and learning management systems."¹⁰⁰ Other authors, including Inga-Lill Nilsson and the team of Deborah Charbonneau and Michael Priehs, also stress the importance of collaboratively dealing with copyright issues in academic libraries.¹⁰¹

Lisa Di Valentino proposes a number of measures to address weaknesses in the management of copyright in academic libraries.¹⁰² She suggests that administrators of higher education institutions negotiate with publishers and copyright owners to draft classroom guidelines, including fair use recommendations for distance learning and for educational multimedia. Institutions should also put in place a copyright compliance policy to guide librarians and faculty who may have questions and should promote copyright literacy among librarians and patrons through library websites. Several universities in Canada, Di Valentino says, use "LibGuides to provide copyright materials in a way that is comprehensive yet allows users to easily locate specific information."¹⁰³



Restructuring the Copyright System

Various alternatives have been proposed to restructure the copyright system to ensure a balance between users and authors of information. For example, Marieke van Schijndel and Joost Smiers claim that copyright has an inherent injustice which invalidates it. Therefore, they advocate for its abolition.¹⁰⁴ Critics belonging to this school of thought further argue that the present copyright system undermines its own goal because it rewards only cultural conglomerates instead of serving the average artist.¹⁰⁵

Another school of thought adopts a more moderate position. This group recognizes the inability of copyright to adjust to modern technology and therefore seeks to optimize and adjust the system to suit the current reality. This view does not endorse the “all rights reserved” concept of the copyright system but also does not encourage those who oppose copyright and advocate for its abolition. The entrenched positions of the parties have sparked a long-lasting war, “a copyright war . . . that lobbyists have won by convincing the world that the constant value of copyright is now under threat.”¹⁰⁶

Monetary Incentives and Public Funds

Zemer suggests that an alternative approach to overcome the weaknesses in the present system of copyright is to replace the current arrangement of rights and rewards with one where remuneration for use of copyrighted works is paid from public funds.¹⁰⁷ Such a system, according to James W. Harris, offers no property right for copyrighted works, but rather recognizes authorship by rewarding it for the social wealth of its creation. It proposes payment of appropriate monetary incentives to authors equivalent to the profit they might have made from their works.¹⁰⁸

Robert Guell and Marvin Fischbaum suggest that authors could sign a contract with the state to sell their IP right in exchange for adequate reward and compensation (possibly based on sales) to serve as an incentive for future productions.¹⁰⁹ The state is expected to legally acquire the creative work for the free use of society using general tax revenue. The reward might be determined based on either forecast or actual data about the worth of the asset. The work becomes owned by the state once monetary incentives are allocated.

The advantage of this alternative is the immediate transfer of the IP right to the public domain, thus allowing users free access to that creation without copyright restrictions. This proposition is like the systems in Norway and Spain, which use state funds to incentivize creators of knowledge goods. In Spain, for instance, compensation for private copying is provided based on an assessment of actual harm to the rights holder. In Norway, usage studies help to determine the harm caused by private copying.¹¹⁰ Implementation of such a system will, however, be problematic in many developing countries, where the accuracy of statistical data is a major concern.¹¹¹

Creative Commons

The Creative Commons licensing scheme is one of the fastest-growing pathways to upholding stakeholder rights in copyright regimes. The plan is a middle-of-the-road solution that ensures a much-needed balance as well as encourages creativity. Creative



Commons refers to the concept of a “commons,” a notion that encompasses “any sets of resources that a community recognizes as being accessible to any member of the community.”¹¹² The Creative Commons philosophy, according to Eva Garmpi, hinges on four hypothetical pillars, which are:

1. Creativity depends on wide access to and use of preexisting works.
2. Copyright law has become an obstacle for the sharing and reusing of creative works.
3. Increased transaction costs associated with the copyright regime restrain individuals from accessing and reusing creative works.
4. Copyrights should be exercised in a way that encourages sharing and reusing.¹¹³

Creative Commons empowers creators of knowledge goods while granting the public wide access to cultural output.¹¹⁴ Creative Commons developed as a complement to copyright by offering licenses that permit sharing and reuse of published content with some constraints. Creative Commons licenses allow the creator of content or the copyright holder to determine the conditions under which others may use their works. The licenses last as long as the copyright on the work but are not an alternative to copyright per se.¹¹⁵

The Creative Commons strategy serves as a middle ground between the acceptance of copyright and its abolition, and it encourages creators to adopt a “some rights reserved” approach as against the current “all rights reserved” model.¹¹⁶ Many academic institutions and government bodies have mandated that their works be published under a Creative Commons license or equivalent open access terms of use.

**Creative Commons
empowers creators of
knowledge goods while
granting the public wide
access to cultural output.**

Conclusion

Copyright is a system that grants economic and moral rights to those who labor in creative activities. Copyright law regulates the dissemination of cultural products representing their maker’s economic investment, labor, efforts, and personality.

Copyright theories are designed specifically to address the moral and ethical inadequacies inherent in the present copyright legislation. Intrinsically, copyright requires a balance to achieve its stated objective, whether viewed from an economic perspective, a utilitarian viewpoint, or a natural rights-based philosophy. From an economic perspective, the protection must be sufficient to incentivize the generation of new works without endangering reasonable societal interest. Copyright law must ensure that rights holders’ privileges and the public interest go hand-in-hand, and the public interest dictates how far protection can extend without denying authors reasonable compensation for their works.¹¹⁷

Each of the theories discussed in this article shares common elements, which blur the boundaries between them. For example, there are traces of utilitarianism, together with principles from a personhood theory, in the Lockean approach. Scholars therefore do not view any of the theories as holistic. D. B. Resnik and Zemer argue for a pluralistic



approach since, according to them, the other approaches are inadequate.¹¹⁸ A pluralistic concept affords scholars and practitioners the freedom to pick and choose from the various theories as a given situation may necessitate. The approach seems favorable to education, especially higher education in developing countries.

The pluralistic framework embodies a theory of IP or copyright which, Margaret Chon says, “asks us to imagine the creative regulatory possibilities for ethical, humane, and just uses of knowledge goods—so as to narrow rather than widen the gap between the IP ‘haves’ and ‘have-nots.’”¹¹⁹ Resnik supports this view by asserting that since we live in a diverse society with many different reasons for controlling information, a pluralistic attitude offers a more pragmatic approach to IP and copyright.¹²⁰

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