PUBLIC AND PRIVATE INTERESTS IN COPYRIGHT LAW: CREATIVITY, SCIENCE AND DEMOCRACY VS. PROPERTY AND MARKET

By

Daryana Iscrenova Kotzeva

(Under the direction of Prof. L. R. Patterson)

ABSTRACT

Copyright law in USA has a utilitarian objective, which has to be fulfilled through economic incentives given to authors. Creative works produce social and cultural benefits for society. Often the market power of the copyright owner, combined with property aspirations prevents the free flow of information and impedes learning. Restrictions of copyright owner's monopoly such as the doctrine of fair use are inevitable. Free speech values in the Copyright Clause are consistent with broad public interest of information and are justified by the notion of liberty. The idea-expression dichotomy reconciles the conflict between the Copyright Clause and the First Amendment. Ideas are important components of the public domain. Public domain is reward for the grant of copyright. Challenges of the new information society require a respect and better understanding of the public purpose of copyright. Democratic goals of Copyright Law cannot be obscured by market and property considerations.

INDEX WORD: Copyright, Society, Author Property, Market, Education, Learning, Ideas, Public Domain, Liberty and Democracy

PUBLIC AND PRIVATE INTERETS IN COPYRIGHT LAW: CREATIVITY, SCIENCE AND DEMOCRACY VS. PROPERTY AND MARKET

By

DARYANA ISCRENOVA KOTZEVA

Master in Law, The University of Sofia, Bulgaria, 1999

A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment of the Requirements for the Degree

MASTER OF LAWS

ATHENS, GEORGIA

2002

PUBLIC AND PRIVATE INTERESTS IN COPYRIGHT LAW: CREATIVITY, SCIENCE AND DEMOCRACY VS. PROPERTY AND MARKET

By

DARYANA ISCRENOVA KOTZEVA

Approved:

Major Professor: L. Ray Patterson

Committee: L. Ray Patterson

Robert D. Brussack

Electronic Version Approved:

Gordhan L.Patel
Dean of the Graduate School
The University of Georgia
May 2002

DEDICATION

To my daughter –Nevena- the only miracle I know in the world.

ACKNOWLEDGMENTS

This is to acknowledge and express my gratitude to the people whose support helped me to cope with completing this thesis. I would like to thank Prof. L. Ray Patterson of the University of Georgia School of Law for his guidance and because he managed to increase my interest in Copyright Law. I wish to thank Prof. Gabriel Wilner of the Dean Rusk Center, University of Georgia School of Law for his paternal attitude toward all LL.M. students. I am very thankful to my friend-Cecilia Alzamora whom I met here in Athens and with whom I established a wonderful friendship-for her cheerfulness in the dark days. My warmest thanks go to my parents and brother who have always trusted in me and whose strong support allowed me to accomplish my mission at the University of Georgia. My special thanks are for my husband who helped and encouraged me from the very beginning of that undertaking. His positive energy and love have been an engine for my hard work during the academic year. I want especially to thank him for taking care for our daughter while I was far away.

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

Copyright law is a complex system to resolve the conflict between the public interests of disclosure and dissemination of works of "authorship" and the individual interest of the creator to exploit economically his own original copyrightable work. On one side there are commercial interests that invoke principles of the commercial world, and on the other side there are cultural and learning needs of society, which must be satisfied. It is also generally agreed that the issues in copyright are intertwined with these of commercial value." Indeed, by affording authors limited monopoly protection for their writings, the U.S Constitution relies on wrangling Greed to promote the advancement of both creativity and profit."[1] The key issue in copyright law has always been the balance between society's right to insist on access to creative expressions and the author's power to restrict their distribution. Legal scholars have made many attempts to suggest reconciling theories but it is obvious that there is no sound solution to this fundamental dichotomy.[2] The evolution of copyright doctrines proves that it is unlikely a " precarious balance" between the exclusive rights of authors and public needs to communicate freely with copyrighted materials will be achieved.[3] Some of factors, which evidence the incoherence in the copyright law, are related to its specific nature. It has been recognized

[1] See e.g. **Jane. C.Ginsburg**, "*Creation and Commercial value: Copyright Protection of works of information in the USA"* **90 Colum. L.Rev. 1865** (1990)
[2]See generally **B.Cardozo**, The Paradoxes of Legal Science (1927), (The reconciliation of the irreconcilable, the merger of antithesis, the synthesis of opposites, these are the great problems of law)

that copyright is supposed to "bring the world of science, art and culture into relation with the world of commerce."[4] "Functionally speaking, copyright must accommodate the interests of three groups: authors, entrepreneurs, and consumers. Thus copyright has three different purposes: cultural, economic and social"[5] This difficult task can be implemented by relying on both kinds of principles: from the market and those, which refer to the intellectual or cultural progress in society. The legislators in the U.S.A. have adopted the understanding that authors should be granted certain economic rights, but the ultimate purpose of copyright law is the promotion of learning. The financial gains offered to the authors are believed to be an efficient instrument for fulfilling the utilitarian goal stated in the Copyright Clause in the Constitution. [6] However, very often when the material interests of the copyright owners are outweighed by public interest concerns, we become witnesses of a "market failure" in the copyright arena where copyright diverges from the traditional market system to generate a desirable outcome for society. It is essential to emphasize that inherent in copyright law, society is given priority and the Framers of the U.S.Constitution were convinced that the needs for learning must not be compromised. The chief goal of that thesis is to explain why and how copyright is essential for our educational, political, artistic and literary culture as well as apply this problem to property theories and market mechanism in copyright law. In the contemporary world of global capitalism the utilitarian message of copyright seems to some extent obscured and that creates a danger for the development of culture and science. The point is that the financial entitlements of the authors become often impediments for the individual and the

[3] See Nein Weinstock Netanel, *Copyright and Democratic Civil Society*, **106 Yale L.J.823,**284(1996)
[4] See **E.Phowman and L.Hamilton**, Copyright, Intellectual property in the Information age, 25(2000)
[5] See L.R.Patterson, *Free Speech, Copyright and Fair use*, 40 **Vand. L.Rev.1,** 54, (1987)

societal progress. Today people need fast and free access to information but often the courts favor the power of the copyright owner who denies that access. The justices following the "Law and Economics" approach in copyright analysis neglect the essential interest of the society to have a close and liberal contact with works of authorship. If that trend continues, values like culture, learning, democracy will vanish and will be replaced only with material concerns. The sole interest of the United States and the primary object in conferring the copyright monopoly lie in the general benefits derived by the public from the labors of authors."[7] In a free market system, the copyright owners can reap benefits for their work without diminishing the access of the public, especially when learning and culture are concerned. Many complications occur when authors start to claim property over their creations .It will be proved in the next pages that property is not compatible with learning because it poses limitations while learning insists on its promotion. Copyright must be interpreted without putting up barriers, which lead to unsatisfactory satiation of the public's needs but at the same time enlarge the pecuniary rights of the copyright holder.

Copyright is a flexible concept, which is open to numerous interpretations and misconceptions. Today judges, deciding copyright cases, have to confront a complicated dilemma: which set of values to embrace either private interests of the copyright owner or public collective interests. Also the judges bear the responsibility of "rationalizing the contradictory features of copyright doctrine in terms of formal categories or underlying

---

[6] U.S.Const.art. I, Sec. 8., cl.8 "The Congress shall have the Power ….To promote the Progress of Science and useful Arts, by securing for limited times,to Authors and Inventors, the exclusive right to their perspective writings and discoveries"

[7] See Fox Film Corp. v. Doyal, 286 U.S 123,128 (1932)

policies."[8] When considering copyright as a proprietary right, the justices will protect the owner's interest and allow him to control the use of his work. In other instances the judges assert that society is entitled to have broad access to works of art and public availability should be more important than private motivation. Perhaps Justice Story was right when he said that copyright really deserves to be called "metaphysics of the law- where the distinctions are, or at least may be, very subtle and refined, and sometimes, almost evanescent." [9] Nevertheless, it is worth trying to explore the mysterious world of copyright and contemplate the reasons of its instability. This may help to distinguish the appropriate criteria to solve the problem concerning whose interests must prevail in copyright infringement cases.

The current copyright system is based on the economic philosophy because the authors producing works of authorship have a chance to enter into agreements with consumers, thus satisfying their subjective demands.[10] Providing copyright owners with personal profit appears to be an excellent means to encourage their creative endeavors. Authors can enjoy a freedom of expression without being afraid of censorship and press control. The market mechanism allows authors to be independent in the creation process and to release to the public desirable "goods" in the form of books, movies, musical compositions, computer programs. The advantage of the market model, incorporated in copyright law, is that what spurs production and leads to an eclectic output in the intellectual sphere. The potential to earn income from the commercialization of new

[8] Peter Jaszi, *Toward a theory of copyright: the metamorphoses of "authorship*", **Duke. L.J.455**, 456, (1991)
[9] Folsom v. Marsh,9 F Cas.342,344 (1841)
[10] See Wendy J.Gordon, *Fair use as market failure: a structural and economic analysis of the betamax case and its predecessors,* **82 Colum.L.Rev. 1600**, 1605 (1982)(The copyright system creates private property in creative works so that the market can simultaneously provide economic incentives for authors and disseminate authors' works.)

works is the main incentive that helps authors to engage in creative activities. This does not build barriers to the democratic development of the society in need of diverse creative expressions. Being exposed to a variety of works gives members of society a choice of views and many works to enjoy. Their fundamental and non-economic interests in expressive diversity and informed citizenship seem to be satisfied. [11] Unfortunately, this scenario, that is described above sometimes differs from the reality because of many practical difficulties arising from the market rights of authors, which tend to block access of others for fears of competition. This provokes a controversy between the desire of the "users" to make transformative and educative uses of existing works and the absolute rights of copyright owners to prevent any unwanted use. In regard to these considerations, the "democratic paradigm"(understood as a conceptual framework for copyright) leads us to the statement that "copyright, like, many institutions of civil society, is in, but not entirely of, the market."[12] If the primary goal of copyright law were only to ensure efficiency, it would put in risk the promotion of learning, and consequently- the cultural enrichment of society. Given this tension between private reward and public benefit, the copyright owner must not be allowed to have a far-reaching control over the possible productive uses of his work. Conversely, there is implied private censorship, which may be very dangerous for the expressive vitality and democratic character of public discourse, thus it is better to view copyright as a" state measure designed to enhance the independent and pluralist character of civil society" than to believe that it serves mainly the private economic interests of the copyright

[11] See Netanel, Supra note 3,at 297
[12] See id. at 341

owners.[13] In that way, copyright constitutes a framework for controlling the disclosure of ideas. Every person makes his/her own decision whether and how to express his/her view, opinion, plan, intention, knowledge or fantasy. "Just as a person's sense of herself is intimately connected with the stream of ideas that constitutes consciousness, her public persona is determined in part by the ideas she expresses and the ways she expresses them. To require public disclosure of one's ideas and thoughts-whether about personal or other matters-would distort one's personality and, no doubt, alter the nature of one's thoughts. It would seriously interfere with the liberty to live according to one's chosen life plans. This sort of thought control would be an invasion of privacy and personality of the most intrusive sort .If anything is private, one's undisclosed thoughts surely are."[14] The world at large has no right to an individual's ideas. A person may decide to keep his/her ideas to him/her self, to express only a part of them or to publish them widely. Although society may benefit a lot from a person sharing his/her ideas, it cannot compel him to share. There is no general obligation for an author to bring his creation to the attention of the public, for the author retains the right to control the initial disclosure, stemming from our respect for the individual. Freedom of expression must be understood also that one has a right not to express one's thoughts or ideas. Without exchange of ideas society may encounter serious problems since it will be deprived of progress. Nevertheless, we live in a world where communication plays a vital role in our survival. We need as many sources as possible of information to gain confidence in life, to increase our intellectual power and to maintain successful relationships with other members of society. This is why society must invent a system which will force authors to remove the veils from their

[13] See id. at 288.
[14] See e.g. **Adam D.Moore**, *Intellectual Property –Moral, legal and International dilemmas* 42 (1997)

creative works. The best method to achieve that is to provide owners of the ideas with an incentive via a series of legal rights and here lies the ambiguous " charm" of the copyright system. When the author is promised a profit for the distribution of his/her works, he/she will be not reluctant to do it. The trade-off in the copyright system is the desire of society to enlarge the public domain permanently while protecting certain private domains temporarily.

CHAPTER II

PURPOSE AND NATURE OF COPYRIGHT

All deliberations on copyright issues begin with the examination of Article 1, section 8, Clause 8, known as the Copyright Clause, in the U.S. Constitution, because it is the only clause that grants this power to Congress. Under this section 8, Congress has the power to take such actions like declaring war, coining money, raising and supporting Armies, and providing and maintaining a Navy. However, no objective is explicitly stated Therefore, the Copyright Clause is unique because it contains a clear indication of the goal of copyright law.[15] The framers of the American constitution, keeping in mind the history of copyright, expressly provided for its purpose: to promote the progress of knowledge and learning. The genesis of copyright is related with the invention of the printing press and its introduction into England. In 1557, Philip and Mary (Tudor) granted the stationers a royal charter creating the Stationers' Company. The members of that entity were almost all of the printers in England-they were businessmen who manufactured and sold books .The charter empowered the company to seek and destroy "unlawful books", which gave the guild the public enforcement mechanism for its private law .As a result, the copyright in its nascent phase was perceived as an instrument of censorship-a device to control the distribution of printed material." [16] Obviously the

[15] See e.g. Lydia Pallas Loren, *The purpose of Copyright,(* http://www.law.asu.edu/Home Pages/Karjala/opposing CR extension)

[16] See generally **L.Ray Patterson and Stanley W.Lindberg,** The Nature of Copyright:A Law of Users'Rights(1991)

founders did not want to perpetuate the misuse of that right as a tool for censorship since that would stifle creativity and freedom of expression. They were reluctant to tolerate a system where the dissemination of the works would depend on somebody else than the author. Their view has been that publishers should not hold a monopoly of the press as their power to government control has been the strongest argument for not granting copyright protection directly to publishers.[17] The main source for the copyright clause is the Statute of Queen Anne (enacted in 1710) that abolished the stationers' copyright in England and destroyed the booksellers' cartel. This is considered to be the first law on authors' right in modern times. One of the most important features of the Statute of Anne was that it was intended to serve primarily the public interest.It created a statutory copyright with three dimensions-cultural, economic, and social. First, by using copyright as an incentive to create, the statute encouraged authors to contribute to the culture of society. Second, by protecting the right to publish a work, it gave entrepreneurs the incentive to distribute the works. Finally, by limiting the rights of the copyright owner to rights that were economic in nature, it gave the user freedom to use the work for purpose of learning."[18] The U.S. framers successfully implemented the concept that made the Statute of Anne so significant. This allowed them to recognize the authors' need for independence in creating and spreading their works of imagination or products of intellectual labor. The belief was that these acts ultimately had to favor the whole society. By assuring the author of an original work the exclusive benefits of whatever commercial success his/her work enjoys, the law obviously fostered creativity. Being provided with an economic inducement, authors must be willing to enclose the results of their labor in

[17] See Patterson, supra note 5 at 26
[18] See Id

other to contribute to the widest possible dissemination of information. They possess total freedom in determining the subject, content and manner of expression. The invisible hand of the market is the only force that can define the actions of a single author. This is why only a concept of copyright as a trade regulation could ensure liberty and self-reliance for the participants in that specific market. It seems realistic to have a multiplicity of views in the public arena when there are no state patrons who may influence the creative process.[19] It is true that state involvement has always been considered a serious danger for autonomous creation, diversity and novelty in the sphere of culture. In the past times writers and artists used to be dependent on royal, feudal and church patronage for their livelihoods.[20] Consequently, the state-supported approach could hardly be accepted as a means for fast and useful interchange of ideas, hence its many drawbacks to learning. Only writers, not obligated to government officials, can help breaking the standardized individual sensitivity and perception. Only these authors may encourage the pluralism, public culture and liberty, and broad-based citizen debate in the society.[21] Thus the Framers decided to give a fiscal independence to authors, mostly because authors unconcerned with monetary remuneration would produce creative works and only publishers with no need for financial return would invest in selecting, packaging and making such expression available to the public. Without copyright law, creative expression would likely be both underproduced and underdisseminated. This concern guided the framers to grant authors exclusive rights to their writings, which allowed them to receive an income while commercially exploiting their own works**.** As a

[19] See Netanel supra note 3, at 291
[20] See id.
[21] See at 296

result, a market of copyright was established and started to function as a method to achieve an efficient allocation of current resources.

Economists usually characterize Intellectual property Law to which Copyright belongs as an attempt to cure a form of market failure.[22] "Market failure" is related closely to the notion of public goods, which can be distinguished by two characteristics: once produced they are virtually inexhaustible and non-excludable as well. The market paradigm (which establishes an artificial scarcity of the products of mind through commodification) appears necessary to resolve the problem with the "free-riders" .It leads to "limited monopoly" granted to the author who can expect monetary compensation for his effort for the transactions referred to his legal rights. In that way the core ideas of the model of perfect competition, well explained by Adam Smith, are implemented in the copyright field. That makes it possible for the consumers (the public) through the pricing mechanism, to extract from the producers (authors) the maximum output for a given input.[23] Since copyright owners receive a sufficient material reward they were believed not to impede the free flow of knowledge. The common understanding was that the author could use the benefits of copyright when did not reject its burdens. In perceiving one's right as a copyright owner, one must respect the rights of the users including all members of society whose need of learning and obtaining information must be satisfied. For that, the contemporary view of copyright is one that promotes the limited statutory monopoly theory.[24] The contrary assumption that copyright is a proprietary right leaves space for numerous misunderstandings in the area of copyright.

[22] See Gordon, supra note 10, at 1610
[23] See id.

By adopting the limited-grant principle, one can realize how copyright serves truly the public and accomplishes its notable purpose of learning. The significance of copyright is in the advancement and dissemination of culture and knowledge, a natural outcome of learning, thus constituting a major channel by which people are educated. In this context, copyright can be construed as a distinctive form of power with a variety of effects on all areas of social life.[25] This is true because copyright law as a part of Intellectual Property law governs the access to information. Information appears to be an extremely important cultural and economic commodity.[26] Since communication is important to all people, in our global electronic society today, this medium is essential.

Very often it is asserted that information is a primary good in the sense that each rational person is presumed to want it because it plays a crucial role in achieving one's life plans and also because it decreases the uncertainty. Having information gives people more advantages and options for self-development. Information may be the most important primary good we can imagine when considering its role in the economy, the development of knowledge and culture as well as and also its impact on society. The significance of that commodity can be easily realized when one concentrates on the consequences of its imperfect distribution, examples being various prejudices.

The unique trait of information is that, once created, it can best be used when it is made available to all. It is well known that a democratic society cannot exist without having access to various information resources, thus the problem concerning the right of access to information is vital to each member of society. Usually, the holders of

---

[24] See **Patterson and Lindberg**, supra note 16, at 61

[25] See generally **Peter Drahos**, A philosophy of Intellectual Property, 6,119 (1996) (Intellectual property rights create distinctive kinds of opportunities…They play a crucial role in constituting markets in information)

intellectual property rights are given the power to restrict such access to information. By allowing some individuals to control or own information and denying access to others, the belief is that more socially useful forms of information will be produced. Information can be viewed through different perspectives but it always relates to knowledge.[27]

As we have the chance to grow in an information society, we should be aware that this type of society imposes new criteria in placing value on information. Specialized, theoretical knowledge is considered to be an active resource. This kind of resource refers to the intellectual tools that are necessary to produce further (knowledge-related) resources from raw, basic information. From that point of view, knowledge is closer to expertise, the higher intellectual ability to create new materials from knowledge itself. [28] Obstacles preventing the free flow of information (construed in its new meaning) are able to greatly affect the progress in society. For example, the way that copyright is designed has a profound impact on the supply of books and other copyrighted material to different groups in the community. The education sector, the main producer of human capital, is naturally the main user of books and the supply of books to this sector is critical to the performance of its task-to educate people. That is why the copyright regime contains fair use provision that allow educational institutions to make use of books on more favorable terms than those given to private individuals.

These privileges granted to the education sector could be perceived as a way in which the goal of building up human capital is maintained while allowing the private copyright owner a reward for his efforts. If the education sector were not given such liberal access to works under copyright law, then it is likely that the social returns from the investments

---

[26] See **Christopher May**, A Global Political Economy of Intellectual property Rights, 4 (2000)
27Id. at 6

in education would not be so high. Unfortunately judges often disregard that interrelation and construe copyright as an exclusive and absolute right granted to the author. Typical examples of this attitude include decisions relying on "university coursepacks". University coursepacks are anthologies of photocopied chapters from various textbooks. That topic is still being debated and courts are reluctant to see these coursepacks as necessary, affordable tools for knowledge.

In Basic Books .Inc v. Kinko's Graphics Corp. [29] the court discussed the issue of these customized photocopied anthologies created and sold by a for-profit copy shop to students. The plaintiff was a textbook publisher and the defendant was a nationwide chain of photocopy shops that offered the entitled service: "Kinko's Copies: Professor publishing". The judges weighed the factors, which defined fair use and determined the coursepack*s* copied and produced by two Kinko's locations did not meet the statutory requirements for fair use. Despite the ruling in that case, shortly after that, the owner of MDS (Michigan Document Service), a commercial copyshop, continued to copy substantial amounts of copyrighted materials, to create coursepacks and to sell the packs to students. The publishers then brought a suit alleging copyright infringement for impermissibly copying certain excerpted works for commercial purpose. The court reasoned that the copies were commercial in nature because they were copied by MDS for profit and not copied directly by students and teachers. The commercial nature of the copies weighed against fair use. The judges concluded that MDS had committed copyright infringement.

---

[28] Id.

[29] See Basic Books, Inc v. Kinko's Graphics Corp. 758 F. Supp. 152(1991)

The outcome of these two decisions did not help the process of learning and the spread of knowledge. To the contrary these judgments are manifestations that the courts support the copyright owner's monopoly and lack objectivity in its considerations. The ultimate result in the academic sphere is that fewer people will be trained thus invoking inefficiencies in the use of existing human capital. The prevailing step in the publisher against the fundamental need of access to knowledge is a wrong direction because it does not take into account the doctrine of external effects and at the same time threatens to reduce information supply.

All intellectual property rights attribute some value to information as a subject of rights and obligations, but each type of right does this differently. Copyright is mainly concerned with the expression of information that complies with the statutory requirement of originality. An author can claim a copyright on many categories of creative expression, including literary works, audiovisual productions, computer software, graphic designs, musical arrangements, architectural plans, and sound recordings. According to the Copy right Act of 1976, a work is protected in all media and for all possible derivative uses as soon as it is fixed in a tangible medium of expression .As soon as a writer types a story on a computer or typewriter, the work carries the protection of copyright law. Originality is a fundamental principle of copyright and it implies that the author created the work through his or her own skill, labor, and judgment. "Thus, originality determines the boundaries of the copyright."[30]

Although originality is an essential element to accord a protection to a work of authorship, it must not mislead us to believe that it implies either novelty or real artistic creativity. Two travelers may have made a chart of the same island or district, or two

reporters may have taken shorthand reports of the same speech. In each case there would be independent copyright. Copyright can be attached to both masterpieces and ordinary works Moreover, in an economy, which is based on technology -literature, art, and science can be employed in any technical application Literature may take the shape of a travel agent's brochure, art becomes a handsomely designed hair dryer, science becomes a digital clock. So in principle any mass-produced article is copyrightable.

According to modern copyright theory, originality is reduced to the author's freedom of choice. All that is needed to satisfy both the U.S Constitution and the statute is for the author to contribute something more than a merely trivial variation. It must be something recognizably his/her own. In that context, originality means little more than a prohibition on actual copying. No matter how poor the author's addition may be, it is enough if it is his /her own.[31] What is the purpose to provide copyright protections to modestly aesthetic production, to works that do not embody exceptional intellectual conceptions or to works that comprise only of pure data? Is this necessary for the goals of copyright to be fulfilled? Under Alfred Bell's minimalist and democratized vision of authorship, copyright doctrine offers no sound basis for distinguishing between oil paintings, art reproductions, motion pictures, lamp bases, poems, and inflatable plastic Santa Clauses. [32] One of the possible justifications for the low originality standards might be that society needs numerous variations of works and cannot be pleased with only a limited number of creations, no matter how exceptionally creative and sophisticated they may be. That concept permits everyone of us to attempt to make a second "Mona Lisa" and claim a

---

[30] See Jessica Litman, The public domain, 39 Emory L.J. 965,975 (1990)
[31] See Alfred Bell & Co. v. Catalda Fine Arts,Inc,191 F.2d 99(1951)at 102-03
[32] See Mazer v. Stein, 347 U.S.201 (1954)(lamp bases); Doran v. Sunset House Distrib. Corp., 197 F. Supp. 940(1961) (Santa Clauses)

copyright over his work. In this regard one of the most prominent judges in the history of American copyright law is Judge Learned Hand who wrote in his earliest copyright opinion: "While the public taste continues to give pecuniary value to a composition of no artistic excellence, the court must continue to recognize the value so created. Certainly the qualifications of judges would have to be very different from what they are if they were to be considered censors of the arts."[33] Based on this articulation, the inevitable death of the Romantic vision of authorship is evident.[34] According to the romantic model, creative processes are magical and are therefore, likely to produce unique expression. The expression appears to be unique because the real author is using words, musical notes, shapes, or colors to clothe impulses that come from his singular inner being. This mysterious inner being may be a "store-house" of impressions, experiences, and works of other authors, but the author's individual sensitivity converts the raw material into something distinguishable and unrecognizable. [35]

According to the new modern version, an author is one who produces a "work" when his/her abstractions receive physical manifestation in particular copy or copies. In that relation it is interesting to introduce the view of M.Twain who is famous as a master of the intricacies of copyright law. His elaboration on the copyright have played a great role and twisted the dominant American discourses of policy making. Mark Twain was able to recognize the flaws in the concept of the autonomous author and all its pretensions. Twain was a publisher and author, but also was a storyteller. Twain as author and Twain's works are foundational to all the conflicts that complicate American copyright

[33] See e.g. **Siva Vaidhyanathan** , Copyrights and copywrong The rise of Intellectual Property and how threatens creativity)105,(2001))

law: originality and genius: piracy and plagiarism: European professional authorship and African storytelling. The ways Mark Twain constructed his journalism, fiction, and speaking careers demystify the notion of authorial originality. Many of the devices, characters, and events that he used in his fiction were lifted from others. Twain was not hung up on originality. He frequently alluded to other authors and works, and even to his own previous works, to signify on what had come before and to satirize flaws in literature and society. He was firmly embedded in storytelling tradition that lay outside the romantic assumption of authorial distinction. [36]

The Romantic "authorship" concept, which implies individual self-proprietorship, was replaced because seemed to be incompatible with the requirements of the new capitalist society. The new model insisted on a strong link between the author and his work, but this was likely to hinder the transferability of copyrighted works. The shift in legal reasoning regarding the idea of originality is obvious if we have a look at two main copyrighted cases. First in Burrow-Giles Lithographic Co. v. Sarony [37] the Supreme Court emphasized on the individualistic artistic genius in a new technological context, as seen by the judges revealing their preference for the romantic conception of originality as an emanation of the author's personality. [38] Second, in Bleistein v. Donaldson

---

[34] See Jaszi, Supra note 8, at 481(During the eighteenth century," authorship" became intimately associated with the Romantic movement in literature and art, expressing an extreme assertion of the self and the value of individual experience together with the sense of the infinite and the transcendental)

[35] See Jessica Litman, *The Public domain,* **39 Emory L.J.965**, 1008(1990)

[36] See **Vaidhyanathan** ,Supra note 33,at 57

[37] See Burrow-Giles Lithographic Co v. Sarony, 111 U.S.53 (1884)(The issue in that case was whether a photograph had a human author or just was a product of a machine. The judges established that photographs were copyrightable.)

[38] See Ginsburg , supra note 1,at 1930 (The keystone of originality,then,would no longer be the independence of the author's labors,but the distinctiveness of the work's conception or execution.Subjective judgement,rather than diligent collection,would be the locus of the work's originality.)

Lithographing Co.[39] the transformation of the copyright doctrine began and originality was gradually was pushed into the service of commerce.[40] Naturally this disassociation of authorship from genius resulted in an intense commercialization of cultural production that was diffused in society. Today, works introduced to the public that are protected under copyright law tend to bear features of "mass" and "commercial" art contrary to few "fine art" productions."[41] This strategy can satisfy everyone and is also able to secure an adequate reward for the copyright owner. Nevertheless, it has been recognized that just as copyright protection extends to expression but not ideas, copyright protection extends only to artistic aspects, but not to mechanical or utilitarian features, of protected work.

Overall, copyright law is supposed to offer protection to the numerous and necessary sources of information in society. In other words, to claim a copyright, the author must prove that his/her piece of information is original but the requirement of originality is quite modest. If we try to enforce higher standards of originality, copyright may turn into a sort of patent with the degree of inventiveness and novelty as decisive factors. Assuming that the universe of creative expression is infinite, judges today assume originality for granted. "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside

[39] See Bleinstein v. Donaldson Lithographing Co., 188 U.S.239 (1903)(The Supreme Court upheld the copyrightablity of a circus advertising poster. It concluded that chromolithographs representing actual groups of persons and things, which have been designed from hints or descriptions of the scenes represented, and which are to be used as advertisements for a circus are "pictural illustrations" within the meaning of the statute.)

[40] See Jaszi ,Supra note 8,at 483

[41] See Bleinstein 88 U.S. at 251 ("Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use-if use means to increase trade and to help to make money picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement. And if pictures may be used to advertise soap,or the theatre,or monthly magazines,as they are,they may be used to advertise a circus.Of course,the ballet is as legitimate a subject for illustration as any other.A rule cannot be laid down that would excommunicate the paintings of Degas.")

of the narrowest and most obvious limits." [42]They do not try to determine whether and to what extent a plaintiff's work is original since the "dissection "of the authorship process is practically impossible. May it is true that "the concept of originality" is a poor substitute for tangible boundaries among parcels of intellectual property because it is inherently unascertainable. [43] From that perspective, the concept of originality is in the interest of legal certainty. The tolerance of copyright affords many similar works and that is in accordance with the public interest to have access to information. The effect is that society has a variety of works of authorship and through consensual transfers, can attain access to them. The private interests of copyright owners are also fulfilled as they receive a reward for putting their works on the market.

[42] Id. at 251
[43] See Litman, Supra note 30,at 974 ("We lack the capacity to ascertain the sources of individuals' inspirations. Thus, the boundaries of copyright are inevitably indeterminate")

CHAPTER III

IMPLEMENTATION OF MARKET SYSTEM AND PROPERTY THEORIES IN COPYRIGHT LAW

The fundamental objectives of copyrights in literary and artistic property are like those in patents for industrial property: creative works produce social, cultural, and economic benefits that society wishes to secure. These works involve investment costs like time, training, materials, technology acquisition, etc. Moreover, marketing copyrighted products requires a costly investment that is more readily recouped given the greater certainty provided by protection .If other members of society were allowed to free ride on works without compensating their creators, the incentives to create would be severely diminished. The justification to implement a market system in the field of copyright is because we don't want to minimize the number of original works. However, the existence of the market mechanism does not constitute a sufficient reason to believe that the ultimate purpose of copyright, namely to promote learning, will be achieved because a paradox is created by the economic rationale of copyright. Intellectual property rights, given to authors are deemed to be opportunities to gain remuneration in the market place. These remunerations act as incentives for them to produce new works that ensure the diffusion of information that benefits the society. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public

welfare through the talents of authors and inventors in "Science and useful Arts". Sacrificial days devoted" to such creative activities deserve rewards commensurate with the services rendered."[44] This may not be, or even only partially satisfied, because holders of intellectual property rights are provided with powers to restrict public access to information. This happens mainly when copyright becomes extremely expansive. When the author expects a big economic return for the publication of his/her works, he/she is willing to produce more and more works. At the same time, by increasing one's monopoly, one limits the access to necessary elements for future works and ultimately their production.

Future authors have limited freedom to draw on earlier copyrighted works because time of their protection lasts for too long. If they want to produce competing works, they are obliged to ask for permission and pay fees to the earlier copyright owner. Naturally, later authors market their works with an increased price because they have to recoup their investment. This system evidences the market power of the copyright owner because the prior owner contracts who can duplicate his/her copyrighted works.

Subsequent author must do research whether to determine if he will be infringing on an owner's rights and this is both costly and time consuming. In some cases, it is virtually impossible for a future author to exercise freely her/her own creativity. Extensive protection may stifle certain types of creative endeavors but some works, such as parody require pre-existing works so are not affected. If the critic has to receive permission before writing his/her article, it would likely not be written for lack of such permission. Also, by requiring permission, a later author can copy certain elements from a copyrighted work, thus possibly leading to market failure. "The social value of

[44] See e.g..Mazer v.Stein, .347 U.S.201 (1954)

information may be greater than the private market revenues it generates, because there may be market failures in creation of intellectual property .For example, the social value of an invention would exceed private revenues if there were positive consumption externalities, such as network effects from computer systems, software standards, or inoculations. Similarly, there is surplus social value whenever cost reductions spill over to other uses without market compensation. Examples here might be accounting systems and weather satellites."[45]

Sometimes the transaction costs of negotiating and obtaining a license exceed the potential gains from the license. In similar cases, the later author will be unable to afford a license and the transaction will not occur, thus depriving society. Therefore, ramifications of market power are dangerous concerning the dissemination of information, especially for public interests. If we assume that a copyrighted work is unique and no one is ever allowed to make use of it, the copyright owner will charge a higher price for access to his/her work and this monopoly will has two consequences: first, this market power will force those consumers willing to purchase the work at its higher, monopoly price, to pay more for the work than they would in a more competitive market. The second consequence is that this market power will coerce those consumers unable to pay the higher more monopoly price, to buy a less adequate substitute or do without. For these deprived consumers, broadening copyright protection imposes a deadweight loss. When copyright protection becomes too broad, the incentive to produce any given work, measured by the expected return, increases. At the same time, both the cost of creating new works and the deadweight loss associated with existing works also

[45]See e.g. **Keith E.Maskus,** Intellectual Property Rights in the Global Economy, 31 (2000)

are raised. Therefore, the copyright system prevents others from marketing a perfect substitute for the original. Exploiting their market power, authors set an ultracompetitive price. To avoid creating an undue deadweight loss, copyright must limit the extent of the market power that copyright can create. Copyright must ensure that future authors can copy those elements from an earlier copyrighted work in order to produce reasonable substitutes for earlier works. The more copyright permits a future author to duplicate the original, the more it limits the market power associated with the work's copyright.[46]

It is generally agreed that marketing is an integral part of the entire production. Without some anticipation that goods will be successfully sold at prices yielding a profit, the act of production will not be undertaken. In order for copyright to exist, creators must be sufficiently compensated, or they will seek another alternative. Creation and production imply costs to the creator and if intellectual property is not protected from piracy in the market, then as soon as the first unit of the delivered good appears in the market, it will be illegally copied and sold to the public for a fraction of the cost. The final result will be that the copies will compete with the originals in the market but will have an unfair advantage in cost and will undermine the profits of the author who will not receive a sufficient compensation. However, under a system of legal protection (i.e. it is illegal to reproduce, and financial penalties are levied on copiers if they are caught) while it is unlikely that reproduction will completely stop certainly the marginal cost of reproduction is increased. The royalty that must be paid to the creator increases the marginal cost of production and distribution.

---

[46] See e.g. Glynn S.Lunnen, *Reexamining Copyright's Incentives -Access Paradigm*,**49 Vand.L.Rev 483** 563(1996)

Some scholars question whether intellectual property really needs a market to exist. They take the position that regime that foster innovation and creativity can and do emerge through the market process without legislative or judicial intervention. The legal system of a free society, based on the right to self-ownership and the voluntary transfer of alienable rights, allows entrepreneurs to generate solutions to problems that many consider to be intractable. The economic incentives facing actual market participants offer greater inducements to creativity than do the idle curiosity or speculation of the academics who study them. Violating rights of self-ownership and control over tangible alienable property that grounds the market system in pursuit of elusive efficiency gains is ultimately inconsistent with economic efficiency and the free market. From that point of view the patents and copyrights are both deliberately state-created monopolies that did not emerge through common law or otherwise spontaneous legal processes, thus are unjustifiable interventions in voluntary market processes. [47]This concept is derived from the understanding that the legal system is an order derived from the adjudication of individual claims rather than from a public policy. It is implied that there may be natural market mechanisms that would provide adequate remuneration to creators, thus it is considered that the markets function in the absence of enforceable intellectual property rights. Although many innovations are not accorded copyright or patent protections they are nevertheless produced on the market. Some of the most valuable unprotected ideal objects include marketing strategies, scientific principles discoveries of naturally occurring substances, jokes and magic tricks, new words and slogans, useful mental process etc. However, most cultural creations are not naturally protected because second comers may appropriate their value through low-cost duplication and distribution, with

[47] See id. . Moore, Supra note 14,at 199

little or no investment in mastering the underlying creative effort. Indeed, free-riding competitors focus their efforts on those creations that had proven success in the market place thus simultaneously reducing the returns to the original.

The market power of the copyright owner is linked with his rational interest, which contradicts the right, and need of learning of every one of us. That contradiction exists because copyright owners frequently are inclined to think of themselves as owners of a proprietary right, thus preventing the optimal use of their works.[48] The existence of property rights has an axiomatic link with ownership. Ownership normally accrues to the expenditure of effort, whatever manner and effort is encouraged through the prospective rewards to be gained. In that way property rights are granted to those who have worked on the improvement of any particular object, even if the object has been transferred afterwards to another owner along with its attached rights. This requires both ownership of one's efforts as well as the alienability of their product. The ownership protects the individual from the unreasonable rights of interest of others in society and from state intervention in their lives.[49] The notion of copyright suggests that ideas and knowledge can be parceled into separable and transferable objects, which enjoy similar characteristics to material property. The author creates an idea but he should be able to transfer the knowledge to someone for an adequate reward. The idea to attach property features to abstract matters is not new because abstract property has existed for centuries. Shares in a company, commodity futures, and even paper money are forms of property that are mostly abstract. [50]Some scholars do not agree that all intellectual property rights

[48] Id at 21
[49] See **May**,supra note 26,at 26
[50]See Richard Stallman , *Innovation and information environment:Reevaluating Copyright:The Public must prevail,***75 Or .L.Rev 291**294 ,(1996)

can be brought unproblematically into economic and social relations on the same basis as material property. The central element in the spontaneous emergence of property rights is scarcity, or the possibility of conflicting uses. When we apply the property rights analysis to ideal objects, there is a lack of scarcity. "If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine: as he who lights his taper at mine, receives light without darkening me." [51] It is a common feature of intellectual property rights that they are not a consequence of scarcity because they are the deliberate creation of statutory law. Immaterial goods can be easily multiplied and can be made scarce only by law. It has to be recognized that copyright "wears the property label uneasily".[52] The very nature of intellectual objects "grounds a strong prima facie case against the wisdom of private and exclusive intellectual property rights". [53] As the Supreme Court has stated, "the copyright owner holds no ordinary chattel".[54] We can justify a person's right to exclude others from possessing and using a physical object when such exclusion is necessary for one's possession and unhindered use. It seems that

[51] See **Moore**, supra note 14, at 349 (The citation belongs to Thomas Jefferson as a part of his letter to Isaac McPherson, Monticello, 1813)
[52] See L.Ray Patterson, *Copyright and "the exclusive Right" of Authors*, 1.J.Intell.Prop.L.1 37 (1993)("Proprietary concepts are detrimental to the purpose of copyright, the promotion of learning.)
[53] See **Moore** ,Supra note 14,at 25
[54] See United States v. Dowling, 473 U.S. 207,225(1985) (The Supreme Court held that the National Stolen property Act(18 USCS 2314) was not applicable to the interstate transportation of "bootleg" phonorecords that are manufactured and distributed without the consent of the copyright owners of the musical compositions performed on the records)

the proprietary view of copyright serves only private interests because it provides owners with power to control the use of their works. Generally, property gives a right of control It is often asserted that property has emerged because humans had an interest to control different elements of the surrounding environment. That what most encouraged the legal construction of property was the desire to control the actions of others in respect to the objects of property.

The proprietary concept has its origin in the natural- law copyright doctrine. Copyright is deemed to be more than a property right according to that theory. It is a natural-law property, which implies the idea that it is, or should be, an absolute right. [55]One of the most popular justifications for this theory lies in the presumption that the author obtains a right for his creative labor, known as the creative-work theory. J.Locke for the first time has articulated the theory regarding the "labor model". [56]In his path-breaking work "Two Treatises of Civil government"(first published in 1690) he forwarded a theory of intellectual property rights inherent in manual works and creations. The application of Locke's theory to the productions of books was the first attempt to displace the intellectual property rights from publishers to authors. He considered that persons had a natural right of property in their bodies. Owning their bodies, he believed, people also own the labor of their bodies and the fruits of their labor Locke thinks that until labored on, objects have little human value and at one point suggests that labor creates 99 % of their is value. It not easy to agree on the theory that ownership allows a person, as against all other persons in the world, to appropriate things to him/her self by the expenditure of labor without any limitations. "Property may look to be an individualistic institution, but

[55] See **Patterson and Lindberg,** supra note 16, at 119
[56] See. **Moore**, Supra note 14, at 21

the very nature and definition of the right seems to require some collective social institution to lie at its base. No natural act can legitimate a social claim to property." [57] In considering the nature of the creative works, one can hardly say that all of their value is attributable to the labor of the author. It is difficult to accept the idea that a work of imagination is to be treated as a product belonging only to the writer himself even though the work is an extension of his/her personality. One must not forget that intellectual activity is not a creation ex nihilio. Inventions, writings and thoughts do not operate in a vacuum If one assumes that authorship is a product of astigmatic repackaging of others' expression, one cannot take the proprietary theory seriously because all works of authorship, even the most creative, include some elements adapted from raw material that the author first encountered in someone else's works. [58]Nobody is able to create a work without using previous knowledge one accumulated in one's lifetime.[59]Thus it seems unfair to let a single creator have complete power over his/her work because allowing this would ignore the vast contributions of others. Perhaps many former contributors are no longer present but that it is not a good reason to allow the last laborer to receive full credit from this joint task.

For John Locke, property rights are held against others and exist only by virtue of their place in social relations or "civil society" while for Hegel, civil society is essentially the market and its legal framework .In Hegel's view property is not absolute, in the sense that it can be used without limit. Contrary to that, property must be legally established by

[57] See e.g. Richard A.Epstein *Possession as the root of title*,{ **13 Ga .L.Rev. 1221**} (1979)
[58] See Litman supra note 30,at 1010
[59] Knowledge is nothing but a vast accretion of incremental additions- a lot of "pieces" which being gathered form our capacity to think, reflect and act. Everybody has to make efforts to create his own world of knowledge. Doing that, one uses resources, which have been introduced to the mankind a long time ago by the predecessors. All former creations are open to use and there should be no restrictions to contact with them. The progress will vanish if we are deprived by some reason of that possibility.

the laws of society where it is owned. Unlike Locke's model, property is entirely a legal construct because it is part of an individual's appropriation of things needed to support the self and is sanctioned through the practices of the state. [60] According to Karl Marx, the concept of property becomes the mechanism for removing the self from the individual through work (through alienation) rather than its reflection. Property denies an individual's self through an act of alienation. Marx believed that a creative worker couldn't enjoy the fruits of his production in a capitalist society, due to the division of labor in industry and the alienation of effort required to earn the exchange value of one's labor. [61]Marx points out two main characteristics of work alienation: first, the worker who has sold his/her labor power to the capitalist is related to the product of his labor as to an alien object which exists outside the self independently; secondly alienation is found in the act of production within the labor process.[62] Due to that the worker is unable to work creatively, his work is not the satisfaction of a need, but merely a means to satisfy needs external to it. Ownership and control are vested in the capitalist who decides what is to be produced, how much and in what way. The theory behind Marxism is related to alienation and property. In his view private property is not only the product, but

[60] See **May** , supra note 26, at 26,27
[61] Id. At 27
[62] See generally **Ernst Fischer**, *How to read Karl Mar(*1996) (According to Marx's theory, labor had to become a multiple activity'divided into many separate ones: for no individual and no community limited in place and time was capable of doing what mankind as a whole was called upon to do. That is why labour evolved a multitude of one-sided activities.The division of labor destroyed unity,created and reinforced social inequality.Marx distinguishes between the social division of labor and the division of labor in manufacture as these two categories overlap and interlink. The personal relationship of the craftsman to his product first began to change with the manufacturing systems in which division of labor began to predominate. But the later introduction of machinery led to a radical depersonalization of the worker. Thus labor in its historical development becomes the negation of its own principle, that of creative activity through which man makes himself: instead ,man makes himself into an accessory of the machine, a partial function in the mechanism of the instruments of labor which dominate him.The division of labor was bound to lead to the division of common property and the transition to private ownership Marx predicted that in that new world the objects. appropriated by man, acquire the crazy power of owning men. The face of man

also the result and the necessary consequence of alienated labor. Later this relationship becomes reciprocal: private property is the product of alienated labor and the means whereby labor alienates itself. In the world of copyright, the creation of works is not like every work process for it is a creative and mostly independent process. The author is linked to his creation abstractly and does not find the product of his labor to be hostile. However, when this product is turned into a commodity for market exchange, the authors 'endeavors are dissolved in society. The author seems to have earned via his/her labor and efforts, property –he has become from knowledge creator an owner. It is claimed that no individual would work if there was no reward linked to property as a result of one's effort. The ownership of property is how an individual in society is able to maintain and protect the freedom on which selfhood depends. Finally, property is a fundamental right to which free individuals are entitled to and intellectual property provides for no exceptions. One of the significant advantages of property rights is that they are easily transferred. The transfer of property allows the original creator-owner to realize an appropriate monetary reward in a market society. In that way the property reward encourages the efforts of individuals and that is instrumental in encouraging human endeavors. As stated earlier, intellectual property rights construct scarcity to ensure that market relations in knowledge objects can be undertaken. The main reason to be suspicious about the advantages of the legal construction of intellectual property is the power that usually comes from the ownership and control established through its institutions. Nevertheless, the commodification of knowledge is said to be an inescapable process. One major reason being is the invasion of a capitalist society that has deepened

---

will disappear behind the merchant's social character mask. The community of competition, the trading society will manifest itself as estrangement and alienation.)

"its penetration into previously non-commodified social relations".[63] Intellectual property rights enable the expansion of capitalism into areas regarded as a realm outside direct exchange relations. The objective is to bridle knowledge into a set of property relations. Under capitalism norms, there is little that cannot be perceived in one way or another as property, like the need to earn profit in order to reproduce capital. These principles have a peculiar reflection on copyright as well. In order to guarantee maximum production and distribution of works of authorship, society should accord " commodity status" to knowledge and treat it as property. Consequently, knowledge is turned into an element of a market system where it can be transferred and passed to those who would value it most by paying a price. Material property is considered to be particularly scarce, while knowledge naturally is not constrained in that manner. Therefore, protection afforded by copyright law artificially converts the status of knowledge from a public good into a private good by making it exclusive. This enables the creators to capture at least some of the public value of their works while preserving an incentive to invest in a socially optimal system of legal protection. Then, the creators permit others to make specific uses of their works in exchange for a royalty payment .In this way, the existence of a copyright allows intellectual property to be marketed and consumed efficiently.

There are arguments that the relation between intellectual property and material property is analogous to that between leasehold and freehold. [64]The leasehold can be viewed as a useful model for recognizing the distinction between material and intellectual property. Scholars make a connection between material property and intellectual property by focusing on the issue of time constraints. Leasehold is a model that emphasizes

[63] See **May** ,supra note 52.at 12
[64]Id at 54,55

limited temporal existence while limited intellectual property rights are similar to the division between leaseholder and freeholder. It is clear they are both legal rights, which cannot be enjoyed in perpetuity, and their life span is limited. Leaseholds seem to be appropriate as they split the ownership of the relevant property into at least two parts. The lease is a time-limited contract transfers the right to use the property or part of it, in a clearly defined way from the freeholder or owner to the leaseholder. Leases consist of conditions on use and responsibilities for the maintenance of the property. When we compare it to intellectual property, one finds the lease is also limited regarding the period to which the rights to use are granted. It is known that leaseholders are able to purchase, for a period of time, a set of rights, which the freeholder enjoys. This parallels the possibility to transfer the right to exploit intellectual property while the author is still able to think through his idea. Moreover, the nature of knowledge presupposes that the author will retain the idea, even if he/she has assigned the right of use in economic terms to someone else. When the right to publish is transferred to the publisher, the author keeps the expressed ideas in his/her mind, to use them in his future creative and mental activities as long as the manner of expression differs. Also, when the leasehold agreement ends, the ownership of the right to use the property reverts to the freeholder but they are exclusive and can be transferred again to another subsequent leaseholder. Rights accorded to intellectual property owners are no longer exclusive when their term expires and they enter the public realm. When comparing the models of leaseholds and that of intellectual property, differences exist in the scarcity of the leased object. When scarcity is referred to the leasehold, it remains unaffected while for intellectual property scarcity has yet to be legally constructed. Thus, although the relation between a legitimized form

of property and intellectual property seems attractive, the differences between the two forms of property are still significant.[65]

The actual economic and social organization of modern society is to maintain and expand wide spread recognition of the legitimacy of all intellectually property. The arguments purporting this view focus on efficiency and utility since a market only based on property rights can ensure efficient allocation. So knowledge must be thought as a property to enjoy the benefits of market allocation. Commodifying knowledge through its characterization, as property appears to be dangerous. [66] To believe that all property is subject to similar treatment without regard to specific characteristics is not justifiable. Copyright does not occupy only the market place but it also performs another role of promoting culture and learning.[67] If one only concentrates on the economic aspects of copyright, one will miss its social purpose and it will turn into a chase after profit. To put a label of property on knowledge and information implies a legal constraint on their flow to the public. Our global information society requires new methods to treat knowledge because its use of that resource fundamentally differentiates it from previous systems of capitalism. Moreover, it is worth noting that the monopoly granted by copyright is not designed to ensure the maximum economic reward. The judges are wrong when they take into consideration only the commercial aspects of copyright law. Everything today is based on the commercial exchange of goods and services but the purpose of copyright is idealistic as it refers to learning, science, education and culture. Thus the judgments must

[65] See May supra note 52,at 56
[66] See **Vaidhyanathan**, Supra note 33,at 15 "Copyright should be about policy, not property…. The goal of the entire copyright system should be to recognize the pernicious repercussions of restricting information, yet to reward stylistic innovation. To foster fertile creativity, we should avoid the rhetorical traps that spring up when we regard copyright as "property" instead of "policy"
[67] See **Patterson &Lindberg**, Supra note 16, at 49,238 (Copyright was never intended to create and guarantee profit, only to protect the work in the marketplace. Users also have rights.)

reflect the rights of users and that is possible only when copyright is perceived as a regulatory concept, not as a proprietary one. The rights of users exist to respond to the increasing need of learning. Justices sometimes see the goal of copyright as only entailing a means to deter infringement and are inclined to decide copyright cases by ignoring the main policy, namely -to stimulate the development of science and art.

CHAPTER IV

RESTRICTIONS OF COPYRIGHT OWNER'S MONOPOLY

Copyright should be recognized more as a regulatory concept, which has come into existence in order to link the natural need of an author to receive a gain for his efforts and the inherent need of a person to learn. Only a positive concept is able to accommodate these natural rights.[68] Copyright is a conditional statutory grant, which has emerged not as a reward for the labor of the author but because of his consent to make his work available to the public. "The social benefit rationale justifies copyright not with respect to each work individually, but with respect to an overall system of production of works".[69] It is held that the reading and listening by the public is paramount. Copyright exists for users and not vice versa therefore public considerations deserve exceptional attention. Copyright is truly created as a bargain with the public as it involves giving up specific freedoms and retaining others where the public trades certain rights in exchange for access to more published works the design of copyright takes into account the rights of the users who need to communicate with the authors' works. The law of users is considered to be an essential component of copyright law today. [70]Without the law of users public communication would be impeded and people would not have access to the rich store of accumulated wealth in knowledge and ideas. The rights of users note that copyright exists not to prevent, but to facilitate, the exchange of ideas and information.

[68] See Patterson Supra note 52 at 26
[69] See Ginsburg Supra note 1,at 1899

By limiting the scope of the proprietary entitlement, copyright seeks to preserve rich possibilities for critical exchange and diverse reformulation of existing works. This is a condition for "deliberation and robust debate" in society because these traits are regarded to be the essence of a democratic culture.[71] Influence of an authors' works on public opinion is compelling and must not be underestimated for literature and art though subtle are powerful vehicles for changing attitudes change or reinforcement of policies. Therefore, copyright owners must act in a way, which allows the broadest communication of their works. They should also acknowledge that limits on their rights exist because copyright is an engine of the progress of knowledge and learning. Authors must be tolerant to the needs of others who want to attain knowledge, which is possible only by permitting broad access. When a work of art or science, is exposed to a diverse audience, it inevitably provokes a dialogue and the dialogue is a spur for further creations. The intensive exchange of ideas and opinions appears to be an incentive for creativity, therefore the purpose of copyright is not only to put ideas and information conveyed by a work in the public domain but also to permit these ideas to be fully utilized by allowing others to build upon them. This is a prerequisite for progress in society The more messages we receive in the form of books, musical compositions, films and other works of authorship, the greater the chance for people to become future creators. If copyright owners neglect this obvious truth, they put at stake the mission of humanity-namely to progress from the acquisitions of past skills and knowledge. There is an important connection between copyright and culture where culture is mostly defined

[70] See generally, **Patterson and Lindberg**, Supra note 16,
[71] See Netanel, supra note 3, at 290

by one's contacts with the world of science and art. [72] If copyright owners misunderstand their rights, they may hinder our cultural sensitivity and growth while depriving people from intellectual food. One guarantee that copyright will never be an undue obstacle to learning is because private use generally is permitted when discussing copyrights. This consists of using a work for one's own learning, enjoyment, or sharing with a friend like copying, but the exception is that the copy is neither for public distribution or sale to others nor a functional substitute for a copyrighted work, currently available on the market at a reasonable price. Private use is also limited to a single copy not intended for distribution. The user who goes beyond these limitations must resort to fair use criteria (to be explained later) to determine the appropriateness of the use. The rule of personal use is appropriate only when the motivation for the use is learning in the constitutional sense, not to avoid a purchase that could otherwise be made. Aside from personal use, copyright law recognizes fair use, a privilege from which the utilitarian justification of the copyright emanates. It is a valuable achievement of copyright law that contributes to the promotion of learning and culture.

There must be certain restrictions on the copyright monopoly but one must avoid the reluctance of the author to produce further creations. Fair use should not be perceived as an unorganized group of exceptions to the rules of copyright, nor as a departure from the most the principles governing this law, but rather as a rational and integral part of copyright, whose observance is necessary to achieve the law's objectives.[73] Fair use "offers a means of balancing the exclusive rights of a copyright holder with the public's

[72] See e.g. **M. Adler and Ch.V.Doren**, Great Treasury of Western Thought", 528 (1977)(Culture is activity of thought,and receptiveness to beauty and humane feeling.Scraps of information have nothing to do with it.What we should aim at producing is men who possess both culture and expert knowledge in some special

interest in dissemination of information affecting areas of universal concern, such as art, science and industry".[74] Fair use also guarantees an important " breathing space within the confines of copyright".[75] Any fair use analysis "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."[76] The judges have promulgated the fair use doctrine for the first time in Folsom v. Marsh but the term was precisely defined for the first time in Lawrence v. Dana[77]**.** For many years before the first decision, copyright owners were tempted to equalize the use of one work and the use of the copyright, which is conferred on it. With the decision in Folsom v. Marsh, [78] the judges resolved the problem and the doctrine of fair use was created. The judicially developed "fair-use " exception presents a concept, that remains "the most troublesome in the whole law of copyright'. It is generally agreed that fair use should be found when the benefit from the non-permissive use of the work outweighs the possibility that allowing the use will discourage creation of such works. The law will excuse a person who appropriates certain material from a work so long as the appropriated material is used in a way that benefits the public without usurping the market for the first work. Problems arise because the public for which this exception has been created is not a party at copyright infringement

---

dierection.Their expert knowledge will give them the ground to start from,and their culture will lead them as deep as philosophy and as high as art." Whitehead in "Aims of education")

[73] See. Pierre N.Leval ,*Toward a fair use standard, {*103 Harv.L.Rev.1105},1107(1990)

[74] See Wainwright Sec. Inc. v. Wall St. Transcript Corp., 558 F. 2d. 91(1977)

[75] See Campbell v. Acuff-Rose Music,Inc., 114 S.Ct.1164 (1994)

[76] See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)

[77] See Lawrence v. Dana, 15 F.Cas. 26,60 (1869)

[78] See Folsom , 9 F. Cas. at 345

cases.[79]The tension, which usually exists between public interests and the interests of the copyright owner, reaches its culmination. The whole development of the doctrine has been influenced by the contradiction between the direct aim of the copyright privilege to grant the owner a right from which he can reap financial benefit and the more fundamental purpose of the promotion the progress of science and the useful arts .The supreme Court has stated that " Copyright law like the patent statutes, makes reward to the owner a secondary consideration." [80] To serve the constitutional purpose," courts in passing upon particular claims of infringements must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry". [81] Whether the privilege may justifiably be applied to particular materials turns initially on the nature of the materials, like whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently, the privilege has been applied to works in the fields of science law, medicine, history and biography."[82]

All these decisions clearly demonstrate that although the fair use doctrine may be malleable, its application must be compatible with the constitutional justification of copyright law. Fair use permits and requires the courts to avoid rigid application of the copyright statute; especially when they encounter a danger concerning creativity which

---

[79] See Anna M. Budde, *Photocopying for research: A Fair use exception favoring the progress of science and the useful arts ,{***42 Wayne L.Rev.1999**,} 2000(1996)
[80] See Mazer 347 U.S. at 203
[81] See Berlin v. E.C Publications, Inc., 329 F.2d 541(1963)
[82] See. Rosemont Enters.,Inc, v. Random House,366 F. 2d 303,308(1966)(Howard Hughes, having purchased through the Rosemont corporation the copyright on articles concerning his life, sought to restrain a biographer's use of articles. The fair use defense was upheld in part because the court found that the plaintiff there was acting in bad faith seeking to prevent the publication of a legitimate biography of Howard Hughes)

copyright law must foster. Although no consistent definition of fair use one can use in every case has ever been developed, a common definition of is a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner (by the copyright).[83] It is obvious that the definition is vague, unhelpful, and as the court has stated. What is fair use depends upon many circumstances**.** One is more likely to agree that fair use is "rule of reason" fashioned by judges to balance the author's right to compensation for his work, on the one hand, against public interest in having the widest possible dissemination of ideas and information, on the other hand.[84] Some consider fair use to be an affirmative defense, which places the burden on the plaintiff to prove that there is no infringement if his copying involves only unpredictable elements such as ideas, processes, facts, or if only unsubstantial quantities are referred to. One reason why this doctrine is so confusing is the problem in answering the question "Who may use fair?" The statutes only imply an answer but law does not work with implications. Since its beginnings, the doctrine has been refined and clarified by many decisions. Finally, it was codified with the enactment of the 1976 Copyright Act. When determining whether the defense of fair use applies, the courts must consider several factors.[85] The statute does not indicate how much weight has

[83] See id. 303,309

[84] We should point that there is a difference in the treatment of the 'fair use" doctrine in the continental system compared to the American system. The continental system views copyright, as a natural right and consequently fair use is an exception, which must be construed narrowly. Since the continental system embraces the individualistic approach, it does not emphasize on the enhancing of the public interest through 'fair use".

[85] See 17 U.S.C.,Sect.107 (1976) ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:1.The purpose and the character of the use, including whether such use is of commercial nature or it is non -profit educational purpose 2.the nature of the copyrighted work 3.the amount and the substantiality of the portion used in relation to the copyrighted work 3.the effect of the use upon the potential market for or value of the copyrighted work.")

to be accorded to each factor but the judges usually emphasize the forth factor.[86] They usually do not take seriously the first three factors as these are considered to be relatively empty propositions. Paradoxically, the doctrine of equitable reason has become a doctrine of inequitable reasoning because the focus has been on the rights of the copyright owner, not on public interest.

Fair use analysis traditionally has been directed to competitor actions thus courts tend to emphasize the eventual economic injury resulting from the competitive use. This is justified by the well-spread theory that copyright is a statutory unfair competition. Constructive competition is competition, which motivates people to make efforts. Competition becomes a combat when competitors start with attempts to impede each other instead of advancing themselves toward "fair play". The principle "Let the best man win" gives way to "Let me win best or not". This implies that intellectual property rights are sometimes said to be monopoly rights. Monopoly is not a moral evil, but there are economic grounds for not encouraging its development. The standard economic objection to it is that it causes a dead weight loss. The economic problem with monopolies is that the "unmet consumer demand is not compensated for by a gain to producers and so the total benefit of the monopoly market is less than the total benefit of the competitive market."[87]When copyright owners object to fair use on an unreasonable basis, the harm to society is twofold: first it prevents subsequent authors to make a reasonable use of their works and second, they prevent the use by consumers. The current position of many scholars today is that there is a danger for fair use as inhibiting learning. Doctrine was originally created to apply to competitors, not consumers. When Joseph Story formulated

[86]See **Nimmer,**3 Nimmer on Copyright &13.05(b)(4) ,13-54 (1978)(The famous scholar also takes the position that the forth factor is the most important)

the doctrine for the first time in Folsom v. Marsh, the copying involved printing and publishing by a competitor. The issue here was about the paraphrasing of 4,5 percent of the plaintiff's work which the defendant used for creating an artificial autobiography of President Washington. Justice Story did not accept the fair use argument since he believed "the entirety of the copyright is the property of the author; and it is no defense, that another person has appropriated a part, and not the whole, of any property. It is obvious that his judgment was influenced by the property theory. Also, Justice Story took the position that copyright plays an important role in the dissemination of writings since without it, publishers would not have been willing to invest in publishing authors works when a rival bookseller might republish them, either in the same, or in a cheaper form. He thought that the exclusive copyright could encourage the publication. This proves that copyright's objective is to stimulate the dissemination, not the creation of the work. The dissemination is necessary to assure access since access creates opportunities for learning. However, in the discussed case the court held that the defendant had infringed the plaintiff's copyright. "The consumer's absence from the fair use equation was not coincidental."[88] A consumer's use of the work was not considered to be contrary to copyright unless it is converted into competitive use. Nowadays, fair use has been expanded to encompass the learning function of copyright hence some interpret the doctrine as a device to increase the monopoly of the copyright owner at the expense of those who have a desire to learn. The litigants in copyright infringement cases are often competitors and for that statutory monopoly law should protect the owner against them. The original intention when adopting the doctrine was to allow subsequent authors to

[87] See **Drahos**, Supra note 25, at 145,146
[88] See Patterson, Supra note 5, at 39

make reasonable use of a copyrighted work. Therefore, the court carefully must determine whether the appropriation in fair use cases is reasonable and customary.[89] For example, in Triangle Publications, Inc v. Knight-Ridder Newspapers[90], the court did not recognize the right of the plaintiff, a publisher of TV Guide to prohibit the defendant's use of some information despite the fact that it was competitive use. The defendant which publishes the Miami Herald Newspaper decided to promote a newly developed booklet which was to be included as a supplement to the Sunday Edition of the paper source. Although the TV Guide covers, reproduced by the. Defendant were competing products .the court held that the public as well as the newspaper benefits from comparative advertising, thus minimizing the importance of a commercial use was involved .The court did not allow the competition to become a combat in that case.

In the first sentence of section 107, Congress expressly recognized certain uses that benefit the public to the degree necessary to qualify for protection as fair use, including reproduction in copies or phonorecords for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. Fair use is not, however, limited to the examples given, rather the examples provide direction in determining what other kinds of uses may qualify as fair. The first factor of a fair-use evaluation, the purpose and the character of the use, may weigh in favor of the alleged infringer if the use is one of those enumerated in the first sentence of section 107,or a use similar to one of them, or a

[89] See e.g.Holdredge v.Knight Publishing Corp., 214 F. Supp. 921(1963) "Some use of the plaintiff's book as a source for an article on Mammy Pleasant as an historical personage could certainly be termed fair. But not only is defendant's article based in large part on plaintiff's work,it mirrors the manner and style in which the plaintiff chose to set down the factual and historical material she used,and to express her thoughts and conclusions.Such an extensive use is well outside the scope of the concept of Fair use,being neither reasonable nor customary,and the defendants can not avail themselves of this defense)

[90] See e.g. Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 455 F.Supp. 875(1978)

transformative use. [91] Judge Leval in Campbell v. Acuff-Rose Music, Inc.[92], revealed his definition of transformative use: transformative work "lies at the heart of the fair use doctrine 's guarantee of breathing space within the confines of copyright and the more transformative the new work, the less likely will be the significance of other factors, like commercialism, that weigh against a finding of fair use." That is an emphasis on the central role of fair use. A noncommercial, nonprofit use also weighs in favor of fair use. If none of these apply, then copying of a commercial nature tends to lead to a finding of copyright infringement. The court usually has to estimate the strength of the secondary user's justification against factors favoring the copyright owner. We should underline the importance of the research use and discuss how the courts tend to analyze it. Because the specific use contributes much to the learning function of copyright, research is considered to be a paradigmatic example of fair use, which is most often met in a university context. Since universities prepare the future leaders of society, it is essential to pay attention to that particular academic use of copyrighted materials. Although copyright policy at first glance sees to be friendly to academic freedom, some court decisions cast doubts on the idea because judges are too willing to apply the neoclassical economic view of copyright in the academic sphere. The ramifications of importing these principles and using them in judging the value of academic contribution to knowledge can be dangerous. Some authors ague that a neoclassical economic justification for copyright is inappropriate when applied to the university mission to promote learning.[93] We know that copying of journal articles take place every day at universities in the whole country and it has been

[91] See e.g. Salinger v. random House,Inc., 811 F.2d 90(1986)(See to what extent the challenged use is transformative)
[92] See Campbell,114 S.Ct. at 1164

recognized as a important activity which brings a minimal harm to the copyright owner compared to the public benefits derived from it. In American Geophysical Union v. Texaco [94] the Supreme Court found that photocopying articles, that was necessary for conducting scientific research was a copyright infringement. The publishers sued not because they objected to the research but because the photocopies would deprive them of additional sales. However, in that way did not demonstrate a respect to the mission of the scientists and that act was a vote against learning. The Supreme court believed that while the research was valuable and beneficial to the public, the commercial sponsorship wiped out any advantage that may have accrued under the first factor of fair use, being the purpose and character of the use.[95] "If that practice persists, the authors and the publishers will not survive having in mind the inexpensive copier technology"-was the majority opinion. Actually, the court refused to view Texaco's use as a research use, which is expressly listed in the preamble of the fair use statute .The justices choose to focus on the potential market for a licensing arrangement for photocopying individual articles and on how Texaco's photocopying could affect the value of the publishers' copyrights in such a market.[96] Although the mentioned decision "casts legitimate doubt

---

[93] See e.g. Maureen Ryan*, Fair use and academic expression: rhetoric, reality, and restriction on academic freedom,* {**8 Cornell J.L.& Pub.Pol'y 541},** 543,545 (1999)

[94]See American Geophysical Union v. Texaco, Inc., 802 F.Supp 1(1992) (Texaco maintained library collection which includes different scientific journals for the purpose of furthering research. The plaintiff Academic Press, Inc published the Journal of Catalysis in monthly issues. A class of publishers of that journal sued Texaco claiming that Texaco's researchers infringed by making photocopies of articles in the plaintiffs' publications.)

[95] See Budde, Supra note 79, at 2015

[96] See Netanel, Supra note 3,at 314 (" Their judgment was based on the neoclassical economic justification of copyright. This doctrine drastically limits applications of fair use while at the same time expands author's proprietary rights to creative works. In neoclassicist theory, property rights are fundamental to market formation and operation. They enable (or induce) market authors to reduce negotiation costs and internalize externalities. But property rights can serve these functions if they are relatively broad and clearly defined. More particularly, given the neoclassicist understanding of property's role in promoting allocative efficiency, neoclassicists tend to favor a general conception of private property rights as universal, concentrated, exclusive and transferable.")

on whether a court would find similar copying of academic expression by professors and researchers on university campuses a fair use " photocopying articles for research must be recognized as fair use."[97] The opposite statement will not be in accordance with the ultimate purpose of copyright. The benefit to society of research use is great and the risk that photocopying will reduce the amount of published research is low. Scholars publish their articles not for economic reasons but mostly because they want to make their work available to the learning audience and to transfer the knowledge to others.[98] Even when the photocopies made from the researchers are exact duplicates of the original articles and serve the same purpose as the original articles, this doctrine should apply. Copying is necessary because it allows researchers to have access to a variety of materials to compose academic work. The fact that one may copy the articles does not deny the fact that each photocopy user remains a potential subscriber, or at least is a potential source of royalty income for licensed copying. It seems that under American Geophysical Union v. Texaco, Inc.,[99] there is no fair use for those who can afford to pay a license fee. However, despite the use of the copyrighted material after decades of photocopied use, scientists continue to write and publishers continue to publish what researchers write. Perhaps more significantly, individuals and corporations continue to subscribe to such material. In spite of the supposedly detrimental effect of photocopying on the market, Texaco increased the number of its subscriptions to the Journal of Catalysis to two in 1983,then to three in 1988. This confirms the conclusion that the long practice of unlimited photocopying does not lead to a decline in the amount of published research, even though researchers are not

[97] See Ryan, Supra note 93, at 557

[98] See id. at 568 ("The academy is the quintessential example of a class of authors whose incentives to create are market transcendent….Because academics do not rely on the economic aspects of copyright

compensated by the publishers for the articles provided for publication, or for the copyright that the authors must transfer to the publishers as a prerequisite for publication."[100] In conclusion, copyright restrictions on academic use premised on a neoclassical theory of copyright has a negative and direct impact on academic values such as critical inquiry, access and dissemination of knowledge. Refusing fair use for research imposes a bar on academic freedom, for generating ideas in the university and for the broad dialogue among scholars. This ultimately will disserve the public interests since a university is generally seen as a political institution, which gives voice and responds to the diverse concerns of society.

Another area of interest when discussing fair use application is the expansion of the scope of protection for biographies and historical works. Generally, these works of authorship present an exceptional value for society and are extremely sensitive to the issues of fair use as well. Unfortunately, some judges are trying to narrow the protection for these works by denying the fair use shelter by injecting into copyright law notions of unfair competition and unjust enrichment.[101]The justices often focus not on the alleged substantial similarity in the expression between the contents of the works but on the lack of the defendant's labor in producing its work. This mistaken emphasis on the value of labor was the reason for the court in Toksvig v. Bruce Publishing Co[102] rejected the fair use defense**.** The judge in that case found infringement based on the copying of 24 specific passages and "certain general concepts of Anderson and his life and friends as set

protection to create, academics will produce scholarship without regard to the availability of copyright protection")

[99] See Texaco 802 F.Supp.at 1

[100] See Budde, Supra note 79,at 2022

[101] See e.g.**William F.Patry** ,The Fair Use Privilege in Copyright Law ,64 (1995)

forth for the first time in plaintiff's book. The plaintiff spent much time trying to gather materials about the life of Hans Christian Andersen-by going to Denmark and by having conversations with people who knew something about Andersen and diligently studied his letters and original works as well, finally resulting in the writing of the biography. Some time after that, her book was used as a source for a novel by the defendant and the court failed to recognize defendant's right to rest on the materials once gathered and published from the first author. The judgment was not sound as it might be construed to require the defendant to retrace all the steps taken by the plaintiff. This task does not conform to the goal of copyright of promoting the progress of science, assuming that defendant's work was not just a colorable variation of plaintiff's.[103] The fair use for biographies and historical works should be tolerated because it allows for potential second authors to have a great opportunity to build upon previous works while adding their original interpretation and revealing their own tenets. Fortunately, in Nash v. CBS[104], the Seventh Circuit reviewed Toksvig and held that" To the extent Toksvig confuses works or ideas with expression, it has justly been criticized…We need not revisit Toksvig on its own facts to know that it is a mistake to hitch up at either end of the continuum between granting the first author a right to forbid all similar treatments of history and granting the second author a right to use anything he pleases of the first's work." The issue of disputes over biographical works has been addressed in Estate of Hemingway v. Random House, Inc [105] as well. In that case, the court had to examine the biography of E.Hemingway as written by the defendant. The plaintiff insisted that the

[102] See Toksvig v. Bruce Publishing Co., 181 F.2d 664 (The plaintiff-Signe Toksvig made a comprehensive research on the life of the well-known writer-Andersen, published a book afterwards and that book served as a source for the defendant's work.)
[103] See **Patry** ,Supra note 101, at 66

author has used a variety of unpublished and published material of Hemingway and documents of ownership passed to the plaintiffs upon Hemingway 's death. Ultimately, it became clear that the appropriated material consisted of only three pages of the defendant's 304-page book. The court dismissed the case for lack of substantial copying and the alternate ground of fair use. Also, in the recent cases of the biographies of Igor Stravinsky[106] and J.D. Salinger[107], although each biography served a useful, educational, and instructive purpose that tended to favor the defendant, some quotations from the writings of Stravinsky and Salinger were not justified by a strong transformative secondary objective. The biographers were said to have taken important passages of the original writing because they made good reading, not because such quotation was vital to demonstrate an objective of the biographers. These were takings of protected expression without sufficient transformative justification. Obviously, the court did not conceive the particular value of the written biographical books for the general public, but let the private interests of the copyright owner to prevail.[108] The conclusion to draw is that there must be no doubt in the appropriateness of fair use defense when the copying is intended to apply to a new biographical or historical work. Society can benefit from works, which are biographical portraits of prominent persons since they contain important information regarding the past and also about the life of influential people. The public interest, which exists toward these works, is justifiable having in mind the curiosity of the mankind to the secrets and mysteries in the history as a whole. If there is a rule, which prohibits all quotation of the subject's prior writings, it would make such biography impossible.

---

[104] See Nash v. CBS, 899 F.2d 1537,1542 (1990)
[105] See Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341(1968)
[106] See Craft v. Kobler, 667 F. Supp. 120(1987)
[107] See 650 F.Supp.413 (1986)

Therefore, the position of courts when deciding similar fair use cases must take into account public considerations when weighing the relevant factors.

The second fair use factor requires a court to examine the" nature of the copyrighted work". Fair use may be determined by the nature of the work .The use of a didactic work will be an educational, noncompetitive use and will be assumed to have a minimal impact on the copyright owner. In contrast, the use of a creative work will typically be a noneducational, competitive use and consequently a significant impact. The rationale for this distinction was given by the dissent in Sony Corp. of America v. Universal City Studios[109]. Informational works such as news reports that readily lend themselves to productive use by others are less protected than creative works of entertainment". The law generally recognizes a greater need to disseminate factual works than works of fantasy or fiction, giving much more protection to the entertainment rather than to factual works. It protects more extensively an individual's creativity and labor when invested in an entertaining work than when invested in a useful work. Such protection can continue attracting additional resources into the creation of copyrighted entertaining works, even when those resources would otherwise have been more valuably used elsewhere in our economy. The inevitable result of such protection might be that we will have too many entertaining works at the expense of having too little of everything else.[110] Harper & Row, Publishers, Inc. v. Nation Enterprises [111]introduced a second consideration to that

---

[108] See Leval, Supra note 73 ,at 1110
[109] See Sony 464 U.S.at 496-97
[110] See Lunney ,Supra note 46, at 562
[111] See Harper& Row,Publishers,Inc. v. Nation Enterprises, 471 U.S. 539 (1985)(The case required the Supreme Court to consider to what extent the "fair use" provision of the Copyright Act of 1976 sanctions the unauthorized use of quotations from a public figure's unpublished manuscript. An undisclosed source had provided The Nation magazine with the unpublished manuscript of "A time to heal: The Autobiography of Gerald R.Ford.Working directly from the purloined manuscript, an editor of the Nation produced a short piece entitled: The Ford Memoirs-Behind the Nixon pardon)

factor, namely, whether the copied work was published or unpublished. In Harper &Row, the Supreme Court held that the major reason to publish the article was to advance the commercial interest of the Nation Magazine. The Nation's publishers wanted to beat out the competition and to create a news event. According to the Supreme Court, Nation's publication had a clearly adverse impact on the market for the work. Nation's fair use defense rested on a claim of news reporting and news reporting is one potential form of fair use but there was no presumption of fair use for news reporting in this case. The judges considered that the public did not gain any extra benefit from Nation's publication since their article simply copied verbatim the original work and did not add any criticism regarding the material. The public gained nothing it could not have obtained from reading the original. Despite everything mentioned, the main factor that influenced the court's decision was the unpublished nature of the original.

The third fair use factor allows a substantial amount of copying when a factual work is involved because usually the second user has to preserve the accuracy of the information, which he wants to transfer in his work. The complete reproduction may be considered sometimes as a fair use and such an example is reverse engineering. [112] The issue of copying entire works arose most prominently after the passage of the 1976 Copyright Act in Sony Corp. v. Universal City Studios, Inc [113] where the Supreme Court found" that the fact that the entire work is reproduced does not have its ordinary effect of militating against a finding of fair use." The rationale behind that judgment is found in the mere

[112]See Atari Games Corp. v. Nintendo of Am., Inc., 975 F. 2d. 832 (1992)(The defendant's copying of the whole copyrighted computer program was deemed as "an intermediate step in the design of a competing but noninfringing program.).

[113]See Sony Corp. of Am. V. Universal City Studios, Inc., 480 F.Supp. 429(1979) (In that case, a unique form of copying, "time-shifting", defined as the "practice of recording a program to view it once at a later time, and thereafter erasing it." was at issue.)

definition of time shifting as delayed viewing since there existed no copying, a prerequisite for copyright infringement.

The forth factor is construed as a measure of loss of market or value of the copyrighted work resulting from the use. In Harper & Row, Publishers, Inc Nation Enters. , the Supreme Court designated this factor as " the single most important element of fair use". [114]The court's recognition of the significance of that factor underlines the fact that copyright is not a natural right inherent in authorship. If that is assumed the effect of the market will seem irrelevant and any unauthorized taking would be unbearable. The utilitarian concept calls for opportunities for authors to realize rewards in order to encourage the creations of works**.** Obviously, when someone makes copies of another's work, it creates a danger for the commercial success of the copyright owner's work and in that way interferes with incentives, offered to the author. Not every type of market impairment opposes fair use. For example, adverse criticism may influence the market in a negative way but such market impairments are not relevant to determine fair use source. The fourth factor disfavors a finding of fair use only when the market is impaired because the quoted material serves the consumer as a substitute or in Story's words "supersedes the use of the original"[115] Notwithstanding the importance of the market factor, it should not overshadow the requirement of justification under the first factor, without which there can be no fair use. Judges are inclined to confuse that and for example in Basic Books, Inc v. Kinko's [116] the Supreme Court found that the mere repackaging was not fair use although it was intended to facilitate a non-profit purpose such as education. The majority supported the idea that the"competetive marketing was

[114] See Harper & Row.471 U.S. at 543
[115]See Leval, Supra note. 73, at 1120

something different from the intentions of the viewers in Sony Corp. of Am. V. Universal city Studios, Inc,[117] who "were not selling their copies of the recorded programs for profit" In that case the court concluded that noncommercial time-shifting of free broadcast television programming serves the public interest in increasing access to television programming, an interest that is consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves and that such time shifting did not result in actual or potential harm to the market for the copyrighted work. The lack of commercial aspects was a strong argument in supporting a fair-use defense. In Roy Export Co v. CBS[118], the court reasoned, "CBS's decision to broadcast the offending version was motivated by commercial rather than educational considerations." Nor does CBS' emphasis on the unsponsored nature of the show establish that CBS did not use the films for commercial exploitation since common experience suggests that CBS stood to gain at least an indirect commercial benefit from the ratings boost which it was expecting from the aired special." This case proves how judges sometimes overstate the importance of the forth factor. Similarly, in Harper &Row, Publishers, Inc. v. Nation Enters. [119], this factor was a powerful obstacle to a finding of fair use. The court considered the Nation article appropriated copyrighted expression far in excess of what was necessary to satisfy any conceivable legitimate news reporting purpose. The publication had the clearly foreseeable effect of destroying Harper and Row's serialization agreement with Time since Nation knew that the portions it copied were also of interest to Time and the sales of the book depended upon the public's

---

[116] See Basic books, 758 F.Supp. at 152
[117] See Sony 480 F.Supp. at 433
[118] See Roy Export Co.Establishment of Vaduz v. Columbia Broadcasting Sys.,Inc., 503 F.Supp.1137
[119] See 471 U.S. 539 (1985)

reaction to Time's excerpts. The dissent believed that there was" blatant infringement, a direct appropriation of some of the most vivid parts of the book", thus the use exceeded that necessary to write a news article. This case involved " chiseling for personal profit" since Nation, a for profit magazine was trying to sell copies and bolster its own prestige. The publisher hoped that the article would sell newsstand copies and generate renewal subscriptions. Although Nation's newsstand profit was small, it was still profit. According to the court, the degree of success was irrelevant, but the judges did not consider that the publication actually contributed to the dissemination of information and knowledge.

There always exist competing interests and judges are often compelled to make policy considerations. Fair use is a mixed question of law and fact.[120] When the injury to the copyright holder's potential market would substantially impair the incentive to create works for publication, the objectives of the copyright require this factor to weigh against the secondary user. This does not mean that public interests should be always compromised. Fair use can easily be used as a device for personal profit regardless of society's needs. Judges must take into consideration that fair use must result in a broader availability of creative works to the public. Despite the fact that copyright owners have been awarded with a "veto whenever their injury is substantial" and guaranteed that the fair use system will not put them at an intolerable disadvantage", the courts should first defend the interests of society which are supreme in copyright law.[121]

---

[120] See Pacific and Southern Co. v. Duncan, 744 F.2d 1490, 1495(1984)
[121] See Gordon , Supra note 10, at 1617

CHAPTER V

MANNERS OF BALANCING THE CONFLICTING INTERESTS IN COPYRIGHT LAW

Although a broad monopoly is considered to be inimical for the achievement of the copyright purpose, some authors take an opposite view .A certain number of safeguards to expand copyright protection have appeared despite the wide-spread concept that limits on copyright are needed. These safeguards assert that the authors are more productive when they expect to be awarded with greater monopoly power and correspondingly with greater financial gains. Thus, with broader monopoly rights, more works are created and disseminated, resulting in greater knowledge. These arguments are based mainly on the economic theory of copyright law which views a system of clearly defined property rights as a prerequisite for market efficiency. According to the neoclassical economic theory, the authors of creative expression must be afforded such proprietary rights that extend to every conceivable valuable use. [122]All these considerations seem to be flawed because they eliminate one very important aspect; namely when authors are granted broad monopolies, they may hamper the creation of new works. That is actually a monopolistic stagnation. The authors they will not be willing to permit others to produce a parody of their original songs or movies, or to write a criticizing article on their book.

[122] See Netanel.Supra note 3, at 306 (While the incentive rationale for copyright focuses on the delicate balance between access and incentive, the neoclassical economic approach strives to establish markets for all potential uses of creative works for which there may be willing buyers .Creative works are thought to be

The debates related to the parody version of Roy Orison's song "Pretty Woman" confirm the fears that copyright can be easily turned into a tool for suppressing others' creative freedom. [123] The ultimate result from claiming a broad copyright monopoly will be that the all of society will suffer from the lack of a variety of works and the utilitarian purpose of copyright law is defeated. Another point in opposition to economic arguments is that creative individuals not always rely on the market for their inspiration as many masterpieces have emerged for reasons not related with the market. There is no certainty that strengthening the protection of copyrighted works will increase the number of new creations. Probably the expansion of the copyright will favor large corporate owners of many copyrights, but not necessarily the single author. Finally a great monopoly will fail to account for the existence of external benefits and non-monetary interests when the copyright market is concerned. Modern copyright policy should take into account those activities, which yield externalities and cause a market breakdown. Let's imagine that a teacher has to urgently distribute multiple copies of an article in order to provoke a discussion on the material. If the focus is on the primary goal of copyright, then the teacher acts properly. If there is concern over the rights of the copyright owner, then there is likely copyright infringement because the teacher has not received permission for the particular copying use of the work. However, the teacher's desire to make and distribute

---

commodities whose value is best determined by the market..Viewed from that perspective ,the purpose of copyright is to advance and allocate learning and knowledge according to this market-assigned value.)

[123] See Campbell v. Acuff-Rose Music,Inc.510 U.S 569 (1994)The rap group 2 Live Crew recorded and distributed a parody of the famous song without having obtained an authorization to use the song from the copyright owners of Pretty Woman.The district court correctly held that the parodic nature of 2 Live Crew's song was meant as commentary and criticism and thus falling under the"umbrella" of "fair use".But the court of appeals reversed the finding of fair use and pointed out that the harm to the copyright owner's market for the copyrighted work outweighed any parodic purpose that might be found in 2 Live Crew's song.Fortunately the Supreme Court recognized the'social benefit" of the new version He did not emphasize on the monetary issues and in that way contributed to the outcome of the litigated case in favor of 2 Live Crew.)

the copies is not done randomly but is done to increase the students' need for knowledge in the most efficient way. The teacher's diligence should be understood as a step in the long-term task to form better-educated students. It is true that education brings numerous benefits to all of us as citizens and therefore the teacher's copying must be viewed from that perspective. Due to the well-performed mission, he may expect in future enviable fruits of his labor. However, these results will reflect on the whole society. Obviously, the teacher is not able to capture that value if presumably he is determined to bargain with the copyright owner. The problem is the impossibility of internalizing the significant external benefits when relying on market principles. It seems that some uses of a work can positively affect society to such a great extent that the economic interests of the copyright owner are ignored, because the owner's power has some limits, otherwise he may prevent "particularly desirable transfers" which have a positive impact on dissemination and the ultimate goals of copyright. [124]

Very often, arguments in favor of granting more rights to users and correspondingly fewer rights to copyright owners are countered by copyright- owning industries. The powerful entities governing print and media markets -markets where ideas are commodified, are strongly enforcing their monopolies.[125] Their concerns mainly reflect

---

114. See Gordon, Supra note 10, at 325

[125] See Associated press Et Al. v. United States, 326 U.S. 1,17(1945), (By-laws of the Associated Press cooperative association, engaged in gathering and distributing news in interstate and foreign commerce, prohibited service of AP news to non-members, prohibited members from furnishing spontaneous news to non-members,and empowered members to block membership applications of competitors.The Court held that:"inability to buy news from the largest news agency,or any one of its multitude of members,can have most serious effects on the publication of competitive newspapers,both those presently published and those which,but for these restrictions,might be published in the future. The widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public…Freedom to publish means freedom for all and not for some. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. In addition to being a commercial enterprise pursued for profit, the Associated Press, has a relation to the public interest unlike that of any other enterprise pursued by profit. .A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship.)

intentions to generate more revenue by charging monopoly prices instead of serving the vital general interests of a free flow of and knowledge. In that way, private corporations contribute to the misdistributions of information in society and intervene in the free disclosure of ideas. Restraints imposed by these corporations do not only have commercial aspects but also in cases similar to that case, usually combine Copyright and First Amendment issues thus engendering controversial debates. [126] It is generally agreed that the copyright clause implies free-speech values that merit recognition.[127] Starting in the 1960s courts and commentators began their deliberations on the possibility of a public interest or First Amendment exception allowing use of copyrighted materials**.** [128] The reason for First Amendment exists is to inculcate the freedom of thought and religion thus making the widest toleration of conflicting viewpoints possible. In Stanley v. Georgia [129] it was held that "If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. America's entire constitutional heritage rebells at the thought of giving the government power to control people's minds. Freedom of speech and the press guaranteed under the U.S. Constitution protects the right to receive information and ideas regardless of their social worth and this right is basic to free society**.** Free speech is a sophisticated right, which guarantees that expression will remain unadulterated. Freedom is a responsibility, an adventure, and a departure from accepted

[126] See 1-1**Nimmer** Constitutional Aspects of Copyright Sec.1.10, (Prof. Nimmer puts the question, regarding the copyright Act:"Is it not precisely a 'law" made by Congress that abridges the"freedom of speech" and"of the press" in that it punishes expressions by speech and press when such expressions consist of the unauthorized use of material protected by copyright?")

[127] See **Patterson and Lindberg**, Supra note 16, at 128("The essential free-speech value in the copyright clause is the right of public access to copyrighted materials…The major rights of free speech in the 1 AM the rights to speak and publish; the major free-speech value in the copyright clause is the public's right to hear and read")

[128] See **Patry**, Supra note 101, at 573

ways of doing things.[130] Referred to speech, it implies the individual choice to present his views utilizing the most appropriate and effective medium. The fundamental value of speech is interaction because it does not only produce information but also seeks to change the listener's perspectives or preferences or tastes, and to shift them closer to the speaker's views. Therefore free speech serves one major value, namely autonomy. The merit of speech is in its power to convey one's thoughts and opinions. It is also an opportunity to gain self-esteem through unrestrained expression of one's tenets, thus speech is valuable independent of people's willingness to pay for it since its activity differs from the activity of exchange on markets. In short, the market metaphor is not proper when talking about the right of free speech because they are fundamentally different and contradictory. This is why it is very dangerous to conceive speech as a market since that will require people to see speakers as "producers" who exchange ideas with willing "consumers", i.e., readers and listeners, up to the point the latter are willing to pay for them. Speech protected by the First Amendment does not involve alienating one's ideas and trading them for a portion of a listener's or reader's attention or time. The basic conflict between copyright and the rights embodied in the First Amendment emerges at this juncture. . Copyright laws are said to regulate the economic attributes of speaking. Free speech rights are a way to acquire truth and understanding, thus appear to be more fundamental than copyright. In Gillian v. American Broadcasting Companies,Inc. , [131]the British comedy show Monty Python's Flying Circus successfully enjoined the ABC network from broadcasting radically edited versions of the comedy programs .ABC had removed an essential part of each show impairing the integrity of the

[129] See Stanley v Georgia 394 U.S.557(1969)
[130] See Kathleen M..Sullivan, *Free speech and unfree markets*, **42 UCLA L.Rev.949**,952 (1995)

copyrighted work and the result was a "mere caricature" of the authors' talents. Similar cases are often treated as contract disputes or matters to be decided under equitable principles but they "could be collected and made the building materials for a First Amendment claim built into copyright protection".[132] In these cases, judges usually make conclusions based on the belief that "copyright is proprietary in nature, presumably because they are concerned with equity as between the litigants and the equity is most often in favor of the copyright owner"[133] For example, in Roy Export Co. v. Columbia Broadcasting System, Inc the court rejected First Amendment news reporting right to use portions of Charlie Chaplin films in a broadcast coverage of Chaplin's death. CBS's taking was not justified as a "part of a newsworthy event" for fair use purposes since CBS ignored and violated the plaintiffs' rights for its own commercial gain and prestige. The reasoning of the court was influenced to a large extent by the economic interests of the copyright owner without trying to accommodate them with the right of free access to information. If the court applied the First Amendment, the judgment would be different This is supported by the statement that the First Amendment is directed to the public and should deter the overreaching of copyright when it threatens the interests of society. More precisely, the First Amendment and copyright law can exist in "juxtaposition despite their apparent opposing purposes" only when copyright is construed as an instrument of public policy.[134] Contrary to that, judges believe that the proprietary theory is more useful to finding a solution to the present conflict." Proprietary rights tend to be concrete, whereas political rights are typically abstract, and in a one-to-one combat of ideas the concrete

---

[131] See 538 F.2d 14 (1976)
[132] See **Moore**, Supra note 14, at 162
[133] See Sullivan, Supra note 130,at 961
[134] See Harper & Row , 471 U.S. at 559(1983)

usually has the advantage over the abstract".[135] It seems that judges prefer not to explore the deep dimensions of political rights and they do not comprehend that First Amendment speech rights ensure an access to information and the lack of such access parallels totalitarian system. [136]The reason for the adoption of the First Amendment has been the concern for the protection of the liberty of the press, which was deemed as a predicate for democracy in society. If the function of the First Amendment is superseded by selfish economic interests of copyright owners, society will lose its democratic function. Moreover, the tension between the copyright statute and freedom of speech has been viewed as a underlying conflict between property and liberty. The contradiction between these two rights is considered to be " anathema to the judicial mind."[137] First Amendment freedom of expression is often portrayed as an enemy of intellectual property rights despite the fact that the two rights (copyright and free speech) are interrelated because both deal with information, the former in the interest of profit and latter concerning freedom.[138] Some authors take the view that the First Amendment is a significant obstacle for copyright because the First Amendment is seen as an absolute right prohibiting all limitations on speech. Other scholars believe that copyright is not a built-in exception to First Amendment protection and this rests on a theory that while the grant of copyright protection itself is constitutional, it remains a statutory grant, which may be superseded by a constitutional grant. "The Copyright may not be read as

[135] See **Patterson & Windberg**, supra note 16,at 131

[136] See Board of Education v.Pico ,(457 U.S. 853) the court held that: school officials may not remove books from school libraries for the purpose of restricting access to the political ideas or social perspectives disused in the books, when that action is motivated simply by the officials ' disapproval of the ideas involved. Their removal of the books denied the respondents their First Amendment rights.

[137] See e.g. Patterson, Supra note 5,

[138] See **Paterrson & Lindberg,** Supra note 16

independent of and uncontrolled by the First Amendment."[139] Inevitably the rights of the authors abridge, to some extent, freedom of speech but no one really believes that every law that abridges speech falls within the First Amendment. "The two kinds of rights overlap in the public access because free speech encompasses the right of access except the right to disseminate ideas." The protection afforded is to the communication itself, to its source and to its recipients."[140]. As in the past, publication was the traditional means of ensuring access to copyrighted materials and also a condition for copyright but the two rights did not seem irreconcilable. Today this could be the basis for a conflict if it is assumed that the copyright is a form of monopoly and the copyright owner is authorized to exercise complete power over his creation, even in denying public access. When courts have to decide a conflict between the First Amendment and Copyright, they have to estimate whether the benefits that may accrue to society from the application of the First Amendment are sufficient to compensate for a restraint on the rights of the copyright owner. That means that judges must decide whether the importance of the particular speech involved outweighs the importance of nonspeech interests. Inevitably, the conclusion be drawn will answer policy questions concerning freedom, liberty, privacy, right of access to information, democracy and learning. Nevertheless, a fair decision must take into account the interests of the public and the community's welfare. In Termineiello v. Chicago the court held that:" It is hazardous to discourage thought, hope and imagination; that fear breeds repression. That repression breeds hate, that hate

[139] See **Nimmer** Supra note 126
[140] See Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council,425 U.S. 748,756(1976)

menaces stable government." [141] There is no doubt that the First Amendment plays a great role in reinforcing the democratic forces in the society. [142] "From different perspective, copyright is supposed to encourage learning and democracy can only flourish in a well educated society. It is not necessary to draw a line between speech, which, may be prohibited under copyright law, and speech, which, despite its copyright status, may not be abridged under the First Amendment. First one must accept that property and liberty are complementary, not opposing forces.[143]Their struggle cannot bring any good either to society, or to the individual copyright owner**.** *"*Where the First Amendment removes obstacles to the free flow of ideas, copyright law adds positive incentives to encourage the flow." [144]

Today judges are not willing to let First Amendment rights prevail over copyright for the same reasons that Americans tend to fear moral rights Moral rights are the last significant but most symbolic gap between the basic rights offered to authors by American law and the rights enjoyed by authors in most other countries.In the U.S system, economic copyright permits authors to obtain monetary remedies or injunctive relief from those who substantially copy their works, (in whole or in part). Under the European model of intellectual property, copyright is a moral right protecting personality, thus justifies remuneration to authors and some control over the work even after it has been sold to the public. Americans tend to fear moral rights because of their broad,

---

[141] See Terminiello v. Chicago 337 U.S. 1(1949)("The constitutional right to freedom of speech, though not absolute, is protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest")
[142] Id.at 4 (The court held "Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear Any word spoken, in class, in the lunch-room, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk)
[143] See e.g.*The Harm of the Concept of Harm in Copyright,* 30 J.Copyright Soc'Y 421,426(1983)
[144] See Pacific and South.Comp.,Inc. v Duncan ,744 F.2d 1490(1984)

subjective and undefined nature of the word "moral".[145] Similar arguments reject First Amendment defense to copyright infringement. The moral right of an author to object to any distortion, mutilation, modification, or other derogatory action in relation to his/her work is linked with his/her right to claim a free dissemination of ideas. If anyone is permitted to alter somebody's work of authorship, it means that one deprives the author of his/her fundamental right to state in public what he thinks. It follows from the principle that free speech requires speech to be secured with some integrity. In Gillian v. ABC[146], the Court reasoned that authors must be able to prevent 'the mutilation or misrepresentation of their work, because to "hold otherwise would contradict the economic incentive that serves as the foundation of American copyright law". It is obvious that the court did not protect the integrity of the work because of the authors' moral considerations or First Amendment arguments. Moreover, judges did not emphasize the social benefit of having unchanged works of authorship. Instead they looked mainly to the commercial aspects of the substantial departure of the original. In that way they subordinated again the right of free speech that was incorporated in the infringed moral copyright to the defined market principles. Providing that the author had not experienced an economic harm, the court may not have rejected the claim of an unreasonable use of the work. In such situations the emphasis on pecuniary rights of authors very often leads to detriments for society. In fact, the public shares an interest in knowing the true source of a work and in receiving the work in its unadulterated form so

[145] See e.g. Michael B. Gunlicks, *A balance of interests: The concordance of Copyright Law and Moral rights in the world wide Economy* ,**11Fordham I.P., Media and Ent. L.J. 601**,604(2001)
[146] See id.

when courts only concentrate on the profit motive, they miss that point.[147] One view is that market practices generally respect moral rights because usually publishers have a few incentives to violate an author's interests in attribution and integrity. Publishers are aware that the intentionally misattribution of the work or altering its integrity would bring about undesirable consequences such as undermining the economic value of the author's work, undermining future works by that author, dissuading other authors from contracting with a publisher and injuring the publisher's reputation in the eyes of the public and problems if the substitution or mutilation would become public knowledge.[148] Nevertheless, there are many cases where copyright owners, after having obtained the assigned copyrights, are willing to sacrifice the moral rights and First Amendment rights of the real authors. Of course, the "so-called "Moral rights" justification in United States is usually controlled by contract law where the author is considered to have no right to prevent alteration if one did not reserve the right of integrity at the time the contract was formed. The author may bring a claim under unfair competition law if the publisher gives the false impression that he is actually selling the author's work. This would convert the question from being a matter of social, political or personal (moral) right into a matter related to stringent market rules. In cases of controversy, a court will most probably evaluate the changes not in terms of free speech rights but solely on the economic interests of the copyright owner. Therefore, there is no absolute principle determining the outcome of integrity cases but one must not ignore the free speech implications in copyright infringement cases when the integrity of the work had been impaired**.**

---

[147] See **Patterson and Lindberg**, Supra note 16, at ("The profit motive, however, is not a wholly reliable monitor. Like the locks in a canal,it may facilitate the flow of information or it may in fact serve to dam that flow")

[148] See Gunlicks, Supra note 145,at 610

The triangle between copyright, the First Amendment and the doctrine of moral rights seems to hide many unresolved issues concerning freedom of expression as a necessary concomitant of a self-governing society, the fundamental need of learning and access to information, and the possessive interests of the copyright owners. Judges need not to be too sensitive about the inherent conflict between these rights; instead they should tolerate a system that suggests a dissemination of news, information and knowledge from as many sources as possible. Only this approach will not hinder the exchange of views in society providing that the integrity of the presented information has been preserved. Copyright and free speech may reinforce each other in the sense that copyright provides financial security to a person for investment in the expression of his/her opinion. Without that financial security, there would be fewer work, and thus less speech. The authors must be guaranteed with a reward for their labour but their power should be exercised only to a limited degree because the goal of copyright is not to enhance their profits. Therefore, the courts must manage to negotiate a path between overprotection and underproduction, and to strike a balance between the social interest in securing free expression and the author's need of material reward.

Under copyright law, one important means of reconciliation of the rights of the author and First Amendment interests is the idea-expression dichotomy. "This dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression."[149] It buffers copyright from charges that it violates the right of free speech. This helps to avoid a direct conflict with the First Amendment by immunizing a subsequent work, which embodies the same ideas presented in the prior work, thus representing an acceptable

definitional balance between copyright and free speech interests. It encroaches upon freedom of speech to some degree in that it abridges the right to "reproduce" expression of others, but the greater public good in the copyright encouragement of creative work justifies this. One can also argue it also encroaches upon the author's right to control his/her work that renders his/her ideas, per se unprotectible, but this is justified by the greater public need for free access to ideas as promoting democratic dialogue."[150] The prominent copyright scholar (Nimmer) also takes the view that there can be no First Amendment justification for the copying of expression along with the idea simply because the copier lacks either the will, the time or energy to create his own independently evolved expression. At the same time the scholar found the photographs of the MY Lai massacre during the Vietnam war were extremely necessary" to an enlightened democratic dialogue". No amount of words describing the idea of the massacre could substitute for the public insights gained through the photographs. The photographic expression, not merely the idea, became essential, if the public was to fully understand what occurred in that tragic episode. It would be intolerable if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs.[151] The question raised is whether some copyrightable works, which enjoy broad public interest protection, might be denied protection and could be used by the public source. It is key to interpret what copyright means in using notion of "idea". Most often it is a label a court attaches to a particular element or a particular level of abstraction, after it has been decided that copyright should leave that element

---

[149] See Harper and Row 723 F.2d at 203

[150] See e.g. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* **17 U.C.L.A.L Rev. 1180**

[151] See **Nimmer** Supra note 126,See also 626 F.2d 1171

unprotected.[152] The idea is perceived not as an epistemological concept, but as a legal conclusion prompted by notions; often unarticulated and unproven; of appropriate competition. Thus, copyright` doctrine attaches the "idea" label to aspects of works which, if protected, would preclude, or render too expensive subsequent authors' endeavors."[153] Courts decide when and where to use the label "idea" or expression by relying on the incentives- access paradigm. If a court feels that access is more important either for the creation for new works or to avoid the risk of monopolization, one will usually identify the element as an idea. The idea-expression dichotomy has its own economic justification as: granting monopolies on ideas would reduce the number of works created because each author would have to invest time in creating an original idea or incur expense in obtaining a license to use an idea belonging to a previous author who "beats him/her to the punch."[154] Protection of ideas per se would encourage entrepreneurs to invest resources not in the most important, useful or entertaining ideas, but in ideas having the maximum varieties of expression. The third reason not to protect ideas is because by their abstract nature, they are often difficult to define for purposes of determining their scope and origination.[155] They are also not easily traced and it is difficult to ascertain the source of an idea and impossible to prove its provenance in any meaningful sense. A court cannot be certain about the genealogy of the employed motifs. The author can hardly pin down the root of his inspiration. [156] If that legal axiom does not exist, subsequent creators will be not able to utilize, transform and recombine different themes, which have been elaborated. A lot of legal battles will be initiated by

[152] See Lunney, Supra note 46,at 541
[153] See Jane C. Ginsburg,*No "Sweat"? Copyright and other Protection of works of Information after Feist v. Rural Telephone,* ***92*** **Colum. L.Rev. 338** (1992)
[154] See **C.Joyce, W.Patry, M.Leaffer.P.Jaszi.** , Copyright Law, 136(2001)

the "first authors" who claim ownership on something that does not belong to them. [157] The copyright monopoly will be so broad that it would impede the production of new works since every author may be blamed for crossing the line between the expression and the idea.[158] The very process of creation will vanish if the authors are scrutinized for borrowing someone's idea.[159] Thus, the ideas are usually perceived as components of the public domain as composing our cultural heritage".[160] Ideas belong to the vast field of the public domain and this appeals to both potential defendants and plaintiffs in copyright infringement cases. Plaintiffs are relieved because there is no need to prove the originality of their works but if they would have to do that to recover for copyright infringement, few proceedings would ever take place. It will be naïve to think that all aspects of a copyrighted work can bear the stamp of the originality. Subconsciously, authors withdraw from the public domain as much as they can for their creative process while transform their talent. But it is a magical act, which undoubtedly is not subject to rational and accurate analysis. The concept of the public domain serves the interests of defendants because they can easily resort to it when they are blamed to have stolen someone's' idea. This is a common defense used when defamation claims have been

---

[155] See Landes and Posner,*An economic Analysis of Copyright law, **18*** **J.Legal Stud.325**,347-53(1989)
[156]See Litman, supra note 30,at 971
[157] See **Vaidhyanatha**n, Supra note 33,at 33 (The distinction between specific expressions and underlying ideas is the most widely misunderstood aspect of copyright law.)
[158] The line between the idea and the expression always seems arbitrary no matter where it is drawn. Attempting to articulate the approach for discovering the line, Judge Hand stated in his"abstarctions" test:" Upon any work, and especially upon a play,a great number of patterns of increasing generality will fit equally well,as more and more incident is left out.The last may perhaps be no more than the most general statement of what the play is about,and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected,since otherwise the playwright could prevent the use of his"ideas",to which apart from their expression,his property's never extended.
[159] See Litman, Supra note 30,at 975 (Many will discover that creations they believed were their own were,at least in the eyes of the law,mere copies of the works of others.)
[160]See Patterson and Lindberg,Supra note 16, ("The materials that compose our cultural heritage must be free for all to use no less than matter necessary for biological survival")

brought. In Shostakovich v. Twentieth Century-Fox Film Corp., [161]the judges held that the music of the famous composers belonged to the public domain and the plaintiffs could not prevent the appearance of their names as composers of the music despite the fact that the film did not appeal to them. The privacy claims were overruled on a public domain basis even though it infringed the moral rights of the authors.

Since the former author's works facilitate our intellectual, spiritual and cultural development, there must be some certainty that we will have them at our disposal whenever we need them. This is one main concern of copyright law, namely to assure people that after a precisely defined period of time, the creative works will be "donated " to the public. Therefore, the idea that an author must have total dominon over his/her work perpetually disserves the public interest. It appeals emotionally to authors because it increases their power especially regarding the secondary market of their copies. Such a power would make copyright an insurmountable economic obstacle for learning. Moreover, this will question the idea of copyright law, which exists because it permits differentiation of a copyrighted work and the ownership of that work. No one is entitled to own the work, but someone can own the copyright and the consumer can own a copy of that work.[162] If society recognizes the ownership of the work, it will be the same as giving legal title to things like ideas and dreams. That brings to mind Plato's Republic where the reason why the philosopher was the ruler in the Republic was that he had a unique access to the transcendental world of abstract objects. Knowledge of these abstract objects was considered to be perfect knowledge. The principal theory behind Plato was that in an imperfect society individuals who gained power on the basis of being

[161] See Shostakovich v.Twentieth Century-Fox Film Corp.87 N.Y.S. 2d 430 (1949)
[162] See Patterson &Lindberg ,Supra note 16,

able to restrict access to abstract objects would use that power to gain more power. If we interpret Plato's statements in the right way, it is evident how dangerous it is let somebody win a monopoly over ideas. Therefore, copyright traditionally is not extended to ideas, methods, systems, plots, scenes a faire, facts and principles or discoveries.[163] In Baker v. Selden, the Supreme Court settled the idea-expression dichotomy holding that "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains."[164] This object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. Where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered necessary incidents to the art, and given to the public; not given for the purpose of publication in other works' explanation of the art, but for the purpose of practical application"[165]

The lay understanding of the public domain in the copyright context is that it contains works free from copyright liability. Works created before the enactment of copyright statutes, such as Shakespeare's Macbeth are available for everyone to use. Another class of old works in the public domain are those which had been created so long ago that their copyright has already expired, such as Mark Twain's Huckleberry Finn. An even larger class of uncopyrighted works in America that entered the public domain were those ineligible for U.S. copyright or failed to conform with the formal prerequisites under the statute. And the most important part is the "realm comprising aspects of copyrighted

[163] See e.g. Schwarz v. Universal Pictures Co., 85 F.Supp. 270,278( )(Scenes a faire are" the common stock of literary composition-"cliches' to which no one can claim literary ownership)
[164] See Baker v. Selden, 101 U.S. 99(1880) 522,577
[165] See id. at 103

works that copyright does not protect". [166]There is a comprehensive articulation on that last part of the public domain, given by Judge Learned Hand in relation with an infringement case involving a play entitled Abby's Irish Rose.[167] One traditional justification for the existence of public domain is that it is the public's reward for the grant of a copyright.[168] If a single creator was allowed a free contact with all public materials in other to produce his/her work, it would be natural to expect that at the end he will contribute to the culture and society. That is the silent agreement in which each new author enters when decides to use the benefits of the copyright.[169] Copyright endures only for a limited time and to make the interaction between the authors' generations more feasible. Meanwhile, numerous works enlarge public discourse, thus allowing society to enjoy a variety of plots, topics, themes that are left open to different original interpretations. Some view the public domain as a secure harbor and assists the courts that are confronted with an insoluble problem in overlapping deeds. Instead of granting a particular author with a copyright over a common plot, the better strategy is to declare that this plot belongs to the public domain. Drawing the boundaries of the commons is

[166] See Litman ,Supra note 30

[167] See Nicholas v. Universal Pictures,45 F.2d. 119 ("We assume that the plaintiff's play is altogether original, even to an extent that in fact it is hard to believe. We assume further that ,so far as it has been anticipated by earlier plays of which she knew nothing, that fact is immaterial .Still,as we have already said, her copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain")

[168] See **Patterson and Lindberg,**Supra note 16("Copyright, of course,is itself an encroachment on the public domain, in that it gives the author a limited proprietary control over his or her writings composed of ideas and words-materials taken from the public domain.The encroachment permitted, however requires a quid pro quo and is limited in both scope and time: to be protected,the author must create a new work, and that work is protected for a limited time only.The first requirement means that copyright cannot be used to claim ideas or writings already in the public domain.The second means that the work which the author produces eventually goes into the public domain.The copyright policy thus serves not only to preserve but also to enrich the public domain")

[169] Id at 138 (An implicit part of the copyright bargain is that the author will not use copyright to inhibit learning or to defeat the public domain.He assumes certain obligations in return for the statutory grant:to provide public access to the work and to preserve the work for the public domain)

very dangerous as it may hinder the author' s creative impulses.[170]If this is not done, then it is likely to create a world where all authors must seek permission from each of their predecessors. As a result, the overall number of copyrighted works will be diminished. Nevertheless the concept of the public domain is created to respond mainly to public interests. It can be perceived as a vast ocean; a symbol of the whole human intellectual history. The authors are on the board of their own ships, sailing throughout the ocean but being aware that the cruise is limited in time. Since all ships are deemed to "sink" to fulfill the essential function of sharing and spreading knowledge. Thus, the world is benefited by all achievements in the intellectual sphere. Also, the existence of the public domain facilitates the immediate and unrestricted access to certain aspects of copyrighted works. The link between the public domain and the idea-expression dichotomy stems from ideas being part of the cultural heritage and no author can own them, proving that the monopoly of the copyright owner is limited. Prospective authors can freely use all raw materials they need to build their own "universe of originality" but without claiming ownership over them. This means that they are not obliged to solicit permission from previous authors and at the same time cannot require future authors to seek their permission. The public domain also rescues judges from the dilemma to estimate and compare exact degrees of originality. This eliminates the danger for the public domain's integrity and puts an end to many fruitless disputes. If authors are permitted to assert rights over information that does not originate from them, the main concept of the public domain will be forfeited. Thus the equilibrium between private and public interests seems

[170] See e.g. Lange, *Recognizing the public domain* **44 law and Contemp.Prob.147** (1981)(For that some think that the public domain is more an"information limbo" than an "informational commons" and the works put there are likely to be lost. The lack of an economic incentive to exploit some work will prevent its appearance in the public space.)

possible if the idea of a vigorous public domain could prevail over indeterminate claims of authorship.

CHAPTER VI

CONCLUSION

The conflict between public access and incentives to authors is not a novel problem but is merely arised in a new context. The need for copyright protection was first recognized because of technological growth .It was not so controversial when it started with the invention of the printing press. The Xerox machine, the audio and videotape and digitalization brought tremendous changes in the field of copyright because it allowed everybody easy access to copy copyrighted materials. Today, the Internet facilitates copying and sharing writings among ordinary readers. Moreover, this is in accordance with the challenges of the new information technology society. Every new society is a negation of the preceding one, where ideas and notions continue to exist deep within the new one. Modern society requires a new approach to copyright to consider its significance for the development of education and culture that promotes human progress. Certainly, some concepts and doctrines must still be in use but others have to be reformulated. The emphasis of copyright law must be put on the dissemination of the information and all impediments for that, imposed by the rigid copyright rules, should be abolished. Copyright is more than just the sum of economic conditions. It has a public purpose, which is supposed to be accomplished by its private function, and that creates problems when deciding where to draw a public/private distinction. The main problem in copyright is that public benefit is usually unsuited to the owner's benefit. Sometimes

society is deprived a benefit because the courts favor the power of the copyright owner. There is no golden rule when copyright issues are being discussed. Under a commercial value view of copyright, fair use exists simply because the transaction costs of restricting copying would be too high to justify enforcement. Despite these cold "law and economics" pronouncements, fair use has clear unquantifiable social benefits. There is no possible justification for prohibiting the public from copying what it wants to copy. In a free market system, the copyright owners can reap benefits for their work without diminishing the access of the public, especially when learning and culture are concerned. Complications occur if they start to claim property over their creations. Property is not compatible with learning because it poses limitations while learning insists on promotion. Copyright policy must be set through the complex interaction among copyright owners and society but always such discussions have to be held with sufficient understanding of the role and the purpose of copyright. Only in that way copyright can contribute to a healthy public sphere where science, democracy and culture are fully recognized.

BIBLIOGRAPHY

Books

1.Christopher May, A Global Political Economy of Intellectual Property Rights (2000)

2.Keith E. Maskus, Intellectual Property Rights in the Global Economy (2000)

3.Adam D. Moore, Intellectual Property (Moral, Legal and International Dilemmas)(1997)

4.William W. Patry, The Fair Use Privilege in Copyright Law (1995)

5.Peter Drahos, A Philosophy of Intellectual Property (1996)

6.Peter Jaszi, Craig Joyce, William Patry, Marshall Leaffer, Copyright law-Fifth Edition (2001)

7.Nimmer on Copyright

8.L.Ray Patterson and Stanley W. Lindberg, The nature of Copyright: A law of users' rights (1991)

9.Richard Watt, Copyright and economic theory (1997)

10.Siva Vaidhyanathan, Copyrights and Copywrongs-The Rise of Intellectual Property and how it threatens creativity(2001)

11.B.Cardozo, The Paradoxes of Legal Science (1927)

12.Phowman and L. Hamilton, Copyright, Intellectual property in the Information age

13.Ernst Fischer, How to read Karl Marx *(1996)*

Law Review Articles

1.Benjamin S. Hayes, "*Integrating Moral rights into U.S Law and the Problem of the Works for Hire Doctrine",* {61 Ohio St. L.J.1013}

2.Jon R. Mostel "*The home videotaping controversy: Fair use or Fair game*" {49 Brooklyn L.Rev. 363}.

3.Peter Jaszi, "*Toward a theory of copyright: The metamorphoses of" Authorship"{*1991 Duke L.J. 455}

4.Michael B. Gunlicks*," Balance of Interest "The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*"{11 Fordham I.P.,Media &Ent.L.J.601}

5. Jane. C.Ginsburg, "*Creation and Commercial value: Copyright Protection of works of information in the USA"* {90 Colum. L.Rev. 1865} 1865(1990)

6.Nein Weinstock Netanel, *Copyright and Democratic Civil Society*,{ 106 Yale L.J.823}

7. L.R. Patterson, *Free Speech, Copyright and Fair use*, {40 Vand. L.Rev.1,} (1987)

8.Wendy J. Gordon, *Fair use as market failure: a structural and economic analysis of the Betamax case and its predecessors,* {82 Colum. L. Rev. 1600}

9.Jessica Litman, The public domain, {39 Emory L.J. 965}

10. Glynn S.Lunnen, *Reexamining Copyright's Incentives -Access Paradigm*, {49 Vand.L.Rev 483} (1996)

11. Richard Stallman, *Innovation and information environment: Reevaluating Copyright: The Public must prevail,*{75 Or .L.Rev 291}(1996)

12.L.Ray Patterson, *Copyright and "the exclusive Right" of Authors*, {1.J.Intell.Prop.L.1} {1993}.

13. Richard A. Epstein *Possession as the root of title*, { 13 Ga .L.Rev. 1221} (1979)

14.Pierre N. Leval, Toward *a fair use standard, {*103 Harv.L.Rev.1105},(1990)

15. Ryan Maureen*, Fair use and academic expression: rhetoric, reality, and restriction on academic freedom,* {8 Cornell J.L.& Pub. Pol'y 541}, (1999)

16. Kathleen M. Sullivan, *Free speech and unfree markets*, {42 UCLA L.Rev.949} (1995)

17.B. Kaplan, The *Harm of the Concept of Harm in Copyright,* {30 J.Copyright Soc'Y 12}(1983)

18. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* {17 U.C.L.A.L Rev. 1180}

19. Jane C. Ginsburg, *No "Sweat"? Copyright and other Protection of works of Information after Feist v. Rural Telephone, {9*2 Colum. L.Rev. 338} (1992)

20.Carl H. Settlemyer*, Between Thought and Possession: Artists "Moral Rights and Public access to Creative works"*{81 Geo.L.J.2291}(1993)

21.Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*{ 43 UCLA L.REV.1}(1995)

22.Jennifer M. Driscoll,*It's a small world after all:conflict of laws and copyright infringement on the information superhighway,{ 20 U.Pa.J.Int'l Econ.L.939}(2001)*

*23.*Yochai Benkler, Free *as the air to common use: First Amendment constraints on enclosure of the public domain*,{74 N. Y. U. L. Rev. 354}(1999)

24.Neil Weinstock Netanel, *Copyright and a Democratic Civil society* {106 Yale L.J. 283} (1996)

25.Sidney A. Diamond*, Legal Protection for the "Moral Rights" of Authors and other creators, {*64 TMR 244) (1978)

26.Deborah Ross, *The United States joins the Berne Convention: New obligations for authors'moral rights?* , { 68 N.C.L.Rev. 363} (1990)

27.Lydia Pallas Loren, *Redefining the Market failure approach to fair use in an era of copyright permission system*s, { 5.J.Intell.Prop.L.1} (1997)

28.Tyler G. Newby, *What's fair Here is not fair Everywhere: Does the American fair Use Doctrine violate International Copyright Law*, {51 Stan.L.Rev.1663}(1999)

29.Beth A. Constant, *The fair Use Doctrine: Just What is Fair? {*29 J.L.&Educ.385 (2000)

30.David Nimmer, *The end of Copyright,{* 48 Vand.L.Rev.1385}(1995)

31. Anna M. Budde, *Photocopying for research: A Fair use exception favoring the progress of science and the useful arts, {*42 Wayne L.Rev.1999,} (1996)

.