Copyright's Empire: Why the Law Matters

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Abstract

Two separate and distinct movements have colonized research in the field of intellectual property. Law and economics has deepened our understanding of the justification for granting monopoly rights over intellectual property. In recent years, economic theories have been used to support the growth of the commons – the free environment, where intellectual property plays little role in generating new creative works and innovation. The second movement is law and technology that has sought to increase understanding of intellectual property through the exploration of how technologies either provide freedoms or impose limitations to how creative works and innovation are created and received by society. Both show us the need to balance private rights against public interests. Consumers and the public in general derive value from the creation of literary and artistic works – we must recognize that authorship is the primary activity that contributes to this benefit. Private rights may be the most feasible manner to encourage authorship. Through the guarantee that investments in producing works will be recovered, authors are more inclined to engage in creative production. Society will stagnate the moment the production of literary and artistic works ceases. The law must ensure that society continues to have materials to develop. This can only be done thought a system that is connected to society through free market supply and demand mechanics.

INTRODUCTION

The Lord of the Rings
an idea…a novel…three block buster movies…a soundtrack and a video game
where does copyright's empire begin and where does it end?

Two separate and distinct movements have colonized research in the field of intellectual property. The law and economics movement has deepened our understanding of the justification for granting monopoly rights over intellectual property and in more recent years, theories in the movement have been used to support the growth of the commons – the free environment, where intellectual property plays little role in generating new creative works and innovation. The second movement is the law and technology movement that has sought to increase understanding of intellectual property through the exploration of how technologies either provide freedoms or impose limitations to how creative works and innovation are created and received by society. The advent of the information age and the infiltration of the Internet into our homes have allowed the ordinary citizen to participate in the process of creating new literary and artistic works and distributing those works across channels that new technologies have opened. Scientific research takes on a completely different meaning as new technologies allow DNA sequences to be analyzed through complex 3-dimensional computer generated models. This movement has increased our understanding of the legal dimensions of new technologies and the effect these technologies have on society, whether in real life or online. The impact of these two movements into many fields of law has increased our understanding of the law of intellectual property and its effect on society. One thing is clear from the literature – there is a balance that must be drawn between reward and incentives for the creator or innovator of the work or innovation and access to information, knowledge and content by the users.

Applied to copyright law, the jurisprudence of law and economics and law and technology together provide insights to addressing the balance between private rights and public interest. The main issue facing copyright law – the extent to which public access to creative works may be the underlying rationale for the imposition of limitations upon the reach of copyright law, particularly in an age where access to information and knowledge is facilitated by technology, arises from the United States constitutional intent. In Article 1, Paragraph 8, Section 8 of the United States Constitution, authors are to have exclusive rights to their writings to promote the progress of arts.[1] Implicit in this is the notion that the ultimate aim for the grant of monopoly rights is the progress of arts for the benefit of society.[2] The historical underpinning for copyright was to encourage learning[3] and this

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[1] U.S. CONST. art. I, § 8, cl. 8 states that Congress is vested with 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 respectful Writings and Discoveries."

[2] According to Professor Nimmer, "the authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the creative monopoly is a necessary condition to the full realization of such creative activities. Implicit in this rationale is the assumption that in the absence of such public benefit the grant of a copyright monopoly to individuals would be unjustified." MELVILLE B. NIMMER ET. AL., CASES AND MATERIALS ON COPYRIGHT 30 (Lexis Publishing 2000)

was done by rewarding authors for using their talents to the ultimate benefit of the public.[4] The grant of the copyright monopoly was the most efficient way to enhance pubic welfare through the works of authors.[5]

Law and economics jurisprudence do not provide compelling arguments to support the notion that the copyright monopoly is the most efficient way to maximize public welfare through the works of authors. In fact, Stephen Bryer, in his tenure piece at Harvard Law School, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*[6], argues that the economic justification for granting rights to authors to encourage authorship cannot be proven.[7] However, economic theories on the creation of market externalities, the causes for market failure and the correction of market inefficiencies provide evidence to retain the copyright system as the institution to correct these market failures and inefficiencies and to encourage authorship. The theories suggest the need for copyright law to achieve that balance between private rights and public welfare as well as individual rights and collective freedoms in a situation where the market for information goods is certainly going to be inefficient. More importantly these theories identify copyright's role in correcting market inefficiencies. The law's expansion in the last three decades had no adverse effect on public welfare because the expansion of the law did not impose additional social costs but rather increased social benefit. Social cost from the expansion of these private rights is nil because market structures change as technologies develop, increasing society's accessibility to creative works. Copyright laws must expand as technology develops to achieve a fair balance between private rights and public interests.

Law and technology literature in recent years have demonstrated that other factors should be taken into account in making a case for copyright law and one of these factors is the role technology plays in shifting the balance of control of creative works from author to user. Users are greatly empowered by digital technologies to reuse and rebuild creative works and the use of technology may strategically alter how works are created and used. In *Code and Other Laws of Cyberspace,* Professor Lawrence Lessig argues that architecture built into the Internet may provide perfect control over activities that occur

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[3] The preamble to the Statute of Anne 1710, the first copyright law, states that the statute is "[a]n Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned." HARRY RANSOM, THE FIRST COPYRIGHT STATUTE 109 (University of Texas Press 1956)

[4] Chief Justice Hughes had identified the primary purpose for the grant of a copyright monopoly, which lies "in the general benefits derived by the public from the labors of authors." A copyright is at once "the equivalent given by the public for benefits bestowed by the genius and meditations and skills of individuals, and the incentive to further efforts for the same important objects." Fox Film Corporation v. Doyal, 286 U.S. 123, 127-128 (1932)

[5] The Supreme Court in Mazer v. Stein alluded to this point, when the Court stated that, "[t]he economic philosophy behind the clause empowering Congress to grant … 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 …" 374 U.S. 201, 219 (1954)

[6] Stephen Bryer, *An Uneasy Case for Copyright: A Study In Books, Photocopies and Computer Programs,* 84 HARV. L. REV. 281 (1970)

[7] Professor Bryer, as he then was, argues that exclusive rights under copyright had only minimal contribution towards increasing the volume of literary production, especially books

online through the use of codes.[8] Codes give authors the opportunity to control the use of their intellectual property independent of copyright law. Trusted systems that provide creators of creative works maximum control over how their works are used when these works are made available online is an example.[9] The use of technology can further restrict society's use of free ideas from common resources. Content over the Internet, for example, can be controlled though the use of technology by copyright owners in such a way that creativity and innovation cannot freely occur.[10] Our ability to build and shape our culture may also be affected as technology develops to provide creators with the ability to control how content is used and decide the sort of content that we receive as a society.[11] The capacity that technologies provide creators of creative works to displace the balance of copyright law and shape how works are used by society shows us how the balance that copyright law intends to achieve is lost. I would like to show in this paper that the effect of technology on the accessibility of creative works gives us many reasons to look to the law of copyright to provide a balance that would not ordinarily exist without the system of copyright laws to draw the balance between private rights and public interest.

I apply these theories to a real-life example many of us would be able to relate to. In a novel about hobbits and goblins and of fantasy and make-believe, titled *The Hobbit,* JRR Tolkien conceived the idea for a greater work that would draw on the foundation of all his previous works. The novel, The Lord of the Rings, was the greatest work built upon many smaller ones by Tolkien. The novel's adaptation and dramatization into 3 blockbuster films, soundtrack music expressing the world of hobbits and goblins, of men and wizards, of good and evil and of struggles and triumphs together with the production of a video game illustrates the entire spectrum of copyright's empire and the balance that must be drawn between private rights and public interest. More importantly, this shows the economic incentives that drive the production of creative works. Producers of creative works rely on property rights as a surety that their investment in producing works is

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[8] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 8 (Basic Books 1999). To Professor Lessig, "[i]n real space, we recognize how law regulates – through constitutions, statutes and other legal codes. In cyberspace, we must understand how code regulates – how the software and hardware that make cyberspace what it is *regulate* cyberspace as it is. As William Mitchell puts it, this code is cyberspace's "law.""

[9] *See id.* at 135. According to Professor Lessig, "…trusted systems regulate in the same domain as copyright law regulates, but unlike copyright law, they do not guarantee the same public use protection. Trusted systems give the producer maximum control – admittedly at a cheaper cost, thus permitting many more authors to publish. But they give authors more control (either to charge for or limit use) in an area where the law gave less than perfect control."

[10] The Internet makes two things possible. First, through the deployment of proper codes, it is possible to control the use of copyrighted material more fully than was possible before the Internet. Second, the concentration of media power is threatened through the availability of new technologies over the Internet that opens up new channels for production and distribution of content. LAWRENCE LESSIG, THE FUTURE OF IDEAS, THE FATE OF THE COMMONS IN A CONNECTED WORLD 200 (Random House 2001)

[11] To Professor Lessig, "In response to a real, if not yet quantified, threat that the technologies of the Internet present to twentieth-century business models for producing and distributing culture, the law and technology are being transformed in a way that will undermine our tradition of free culture. The property right that is copyright is no longer the balanced right that it was, or intended to be." LAWRENCE LESSIG, FREE CULTURE, HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 173 (The Penguin Press 2004)

recovered. The conclusion I draw from my analysis is this – law and economic jurisprudence show us that the social cost for the grant of intellectual property rights to content creators is always dependent on the benefit that accrues to society to enjoy the work as new technologies develop. The expansion of rights should be allowed if the impact of an expansion on society is marginal. Our understanding from law and technology jurisprudence is that technology can always be used to displace the balance that copyright law seeks to achieve. To promote the progress of science and the useful arts, authors and inventors must be given exclusive rights in their respective writings and discoveries. Private rights ordering alone will not achieve the balance between private rights and public interest. In conclusion, I argue, copyright's empire – the institution that is intended to encourage authorship to ultimately serve the public interest must be built upon a firm foundation of law. It is only through law that the proper conditions for authorship can exist for the ultimate benefit of society.

1. LAW & ECONOMICS ANALYSIS IN COPYRIGHT

The traditional justification for copyright law, based on law and economics reasoning, lies in the rationale that a temporary monopoly right is necessary to encourage authorship to ultimately benefit society as a whole. The grant of a temporary monopoly over literary and artistic works serves a utilitarian purpose that is to "stimulate production of the widest possible variety of creative goods at the lowest possible price."[12] The first copyright statute, enacted in England in 1710 to put an end to the bookseller's monopoly over the book trade, displays the thread of utilitarianism through it. The Statute of Anne, enacted as an "act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies during the times therein mentioned," forms the historical basis for most copyright legislation in common law countries.[13] The utilitarian basis for copyright protection may also be seen in the United States Constitution, which allows Congress the authority to enact legislations that promote the progress of science and useful arts by providing authors and inventors the exclusive rights to their respective writings and discoveries for a limited duration in time. The enactment of the first copyright legislation in 1790 indeed reflects this intent to promote general societal development as the act was enacted "for the encouragement of learning by securing the copies of maps, charts, books and other writings, to the authors and proprietors of such copies during the times therein mentioned."

The development of the law of intellectual property has given scholars and practitioners a reason to further understanding and increase scholarship in the field and the law of real property has been used to justify the intellectual property owner's right to exclude society from using the work without prior permission. The economics that lie behind this right to exclude is in allowing the creator of intellectual works to recover

[12] PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT, PRINCIPLES, LAW AND PRACTICE 3 (Oxford University Press 2001)

[13] The common law copyright tradition began in England and is part of the former British colonies and the countries of the British Commonwealth. According to Professor Paul Goldstein, "the ideal copyright legislator will test every proposal to extend copyright against the criterion of utility and will vote for the proposed extension only if it is demonstrably necessary to stimulate the creation of new works." *See id.* at 3

investments made in producing the work. In this way, creators of intellectual property are allowed to recover the benefits that society receives from the creation of the work through exclusive rights that they have as a result of their intellectual property right. Professor Edmund Kitch, Joseph M. Hartfield Professor of Law at the University of Virginia Law School, has observed that one oversight that many scholars and commentators make about the right to exclude society from using the work in ways that have not been permitted by the right owner is that intellectual property provides the right owner with an economic monopoly over the work. Monopolies over works are separate and distinct from property rights in works. A right to exclude others from using the work is not the same as an economic monopoly to control competition in a free market place.[14]

Professor Kitch is right because use of the term "monopoly" to describe the control an intellectual property right owner has over the work suggests a market for content that has only one producer or seller. For copyrighted works, use of the term monopoly conveys the ability of a sole copyright producer to exclude market competition by the sole fact that the copyright owner becomes the market for the good and is in complete control of the amount of output of content offered for sale to the public.[15] However, for content, the market is significantly different as competition may enter a market with a product developed from the idea underlying the original work.[16] The markets for literary and artistic works rarely produce monopolies in the economic sense because competitors are free to create competing products with the same underlying features. "Monopoly" over works of intellectual property then is more commonly understood to convey control or property rights over works – rights that allow its owner to define the scope of the rights and prevent society from using the works.

The recognition of property rights in the work is granted to exclude others from an overuse of intellectual resources and internalize market externalities. The most often cited work to support a theory of property in this field is Garrett Hardin's 1968 paper,

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[14] Edmund W. Kitch, *Symposium: Taking Stock: The Law and Economics of Intellectual Property Rights: Elementary and Persistent Errors in the Economic Analysis of Intellectual Property,* 53 VAND. L. REV. 1727, 1734-1736 (2000). According to Professor Kitch, "From an economic point of view, "property" and "monopoly" have almost nothing to do with each other. A seller who owns his wares has property but no monopoly if many other people independently sell similar things in the same market. A seller who can control the price of what he sells, because no one seriously competes with him in the market, has a monopoly but not property if he does not own what he sells."

[15] ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 328 (Prentice Hall 2001). According to Pindyck & Rubinfeld, "[i]f the monopolist decides to raise the price of the product, it need not worry about competitors who, by charging lower prices, would capture a larger share of the market at the monopolist's expense. The monopolist is the market and completely controls the amount of output offered for sale."

[16] The Copyright Act 1976 states that "in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b). In *Mazer v. Stein,* for example, the Supreme Court decided that copyright existed in statuettes but not in the idea of using the statuettes as a base for a table lamp. 347 U.S. 201, 217 (1954). In *Baker v. Selden,* the Supreme Court decided that copyright protected an author's explanation for a book-keeping method but not the method itself. 101 U.S. 99, 104 (1879). In *Nichols v. Universal Pictures Corp.,* the Court of Appeals for the Second Circuit decided that a copyright in a play did not extend to the underlying ideas and themes of the play. 45 F.2d 119, 122 (1930)

titled, Tragedy of the Commons.[17] In that work, Hardin argues that common pastures are prone to overuse. Where a village's common green is available for the feeding of all the village livestock, each additional livestock that is added to the commons creates an additional cost that the entire village bears. If each livestock owner acts on his or her own best interest and adds livestock to the commons, an inevitable tragedy occurs as the commons is overgrazed and becomes no longer able to support any more livestock. The village faces a disaster and the tragedy of the commons occurs. The same reasoning has been applied to intellectual property – because information goods is available for all to use and is common to society, information is prone to over use and unless fences are erected, common resources such as information will be depleted in the same way commons pastures are overgrazed.

The tragedy of the commons in economics is the presence of externalities in a market. Where a production and consumption activity is not directly reflected in the market, externalities occur and as a result, the prices of goods do not reflect their social value. As a result, firms may produce too much or too little goods and create market inefficiencies. Property law allows market externalities to be internalized by the producer and allow the costs and benefits of the activity to be reflected in the price of the goods and transferred to the purchasers.

Professor Mark Lemley, William H. Neukom Professor of Law at Stanford Law School, argues that rights in intellectual property are being construed as a form of real property right as real property rhetoric provides a strong case for exclusive rights to protectors of intellectual property. The rhetoric of real property in intellectual property law emphasizes that private ownership is necessary to prevent market externalities from occurring and allows fences to be built around intellectual property as a solution to the tragedy of the commons. Relying on Professor Harold Demsetz's work, Professor Lemley, shows that property rights may be used to limit negative externalities arising from transactions in the market and when the cost of these negative externalities become sufficiently high, the costs of introducing property rights into the market are justified.[18] Professor Lemley goes on to argue that the application of the exclusionary right in real property to intellectual property has led the courts and commentators to argue that free riding – unjustly benefiting from the investment that intellectual property owners make in producing the work or invention – must be wrong and therefore removed from the system. Protectors of strong intellectual property rights argue that where society is allowed to free ride on an invention or work, intellectual property owners will not invest sufficient resources in developing the invention or work because they are not allowed to capture the full social benefit of the invention. The property rights in intellectual property

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[17] Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968)

[18] According to Professor Lemley, "[i]n his classic work on the economics of property rights, Harold Demsetz argued that property rights are valuable in society because they limit the creation of uncompensated externalities. In a world without transaction costs, Demsetz argued, the creation of a clear property right will internalize the costs and benefits of an activity in the owner and permit the sale of that right to others who may value it more. Once transaction costs are taken into account, Densetz believed that the creation or alteration of property right could be explained by asking whether the social gains from internalizing an externality exceeded the costs of doing so." Mark A. Lemley, *Property, Intellectual Property and Free Riding,* 83 TEX. L. REV. 1031, 1037-1038 (2005)

must be strong enough so that the social value of the invention or work does not exceed the private value to the creator of intellectual property.[19]

Within the realm of copyright law, Professor Lemley's arguments are particularly applicable. Professor Lemley is correct to present that intellectual property rights owners should not be entitled to capture the full social value of their work because it is impossible to fully internalize positive externalities in the marketplace. Full internalization of externalities is also not necessary but only so much as is necessary to recover the investment made. The tragedy of the commons does not happen in the realm of copyright, where the market is one for information goods that is to economists, a pure public good, which is not excludable and non-rivalrous. An intellectual property owner cannot easily exclude others from benefiting from the work and one person's use of the work does not affect another person's use. There are also severe costs to the grant of intellectual property rights that Professor Lemley states.[20]

Here, I build upon Professor Lemley's paper. I argue that for copyright law, it is not only impossible to internalize positive externalities in the market but that it is also harmful to allow for a complete recovery of consumer surplus. Market inefficiencies and market failures should be an expected state of affairs for copyrighted works as positive externalities are unaccounted for. As the markets for literary and artistic works are in most circumstances inefficient and as the existence of market externalities is a source for market failures, institutional intervention through copyright law is necessary to correct these inefficiencies and set conditions where authorship and creativity can occur.

A. Positive Externalities in Markets for Information Goods

In the market for information goods, externalities occur when the production or consumption of literary and artistic works are not directly reflected in the market. Actions by producers and consumers of such works affect other copyright producers and consumers but this is not accounted for in market prices. The presence of positive externalities, where society benefits from the production and consumption of a work, is a given condition of the market for intellectual goods. The investment made in producing a movie creates private benefits to the movie producer and when marketed, the firm can earn a large profit to cover the cost of investment in producing a movie. However, the movie is also available to the public for enjoyment and viewing – benefits that society will enjoy freely in the form of a positive externality. The English writer, scholar and philologist John Ronald Reuel Tolkien wrote the Lord of the Rings and published his work in 1954 and 1955. By 2001, the Lord of the Rings had sold over 52 million copies

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[19] *See id.* at 1039-1041

[20] Professor Lemley states that, "[t]hese costs fall into five categories. First, intellectual property rights distort markets away from the competitive norm, and therefore create static inefficiencies in the form of deadweight losses. Second, intellectual property rights interfere with the ability of other creators to work, and therefore create dynamic inefficiencies. Third, the prospect of intellectual property rights encourages rent-seeking behavior that is socially wasteful. Fourth, enforcement of intellectual property rights imposes administrative costs. Finally, overinvestment in research and development is itself distortionary." *See id.* at 1058-1059.

world wide and has been translated into 25 different languages.[21] The measure of the private benefit to Tolkien from the sales of his novel is reflected in the cumulative price of the 52 million copies of the novel sold (D). The novel also created positive externalities in the form of external benefits not reflected in the price of the novel as readers enjoyed the adventures of hobbits, men, wizards, dwarves and magicians in the novel they read (EB). The social benefit of the novel would be the sum of the private benefit accruing to Tolkien and the external benefit accruing to the readers of the novel (SB=D+EB).

In 2001-2003, the novel was dramatized into three film parts – The Fellowship of the Rings (2001), the Two Towers (2002) and Return of the King (2003). The total cost for producing the Lord of the Rings trilogy was $270million. The three movies were a huge success, being the 11th, 5th and 2nd most successful films of all time respectively. The movies made $2.92billion at the worldwide box office.[22] The film soundtrack by Canadian composer Howard Shore used a particular technique called leitmotif[23] as a musical theme to bring out the characteristics of the people, places and culture in the movies[24] and radio listeners in the United Kingdom, captured by the music, voted the soundtrack as the greatest film soundtrack in a poll in 2002 and 2003.[25] A massive multiplayer online game has also been developed from the novel.[26]

Positive externalities spinning off from a novel in this case are many. Ideas that generate the production of derivative works are a form of externality that is not captured in the prices for the novel, creating consumer surplus as the uncompensated positive externalities that arise from the production of the novel. However, as long as enough returns are made to cover the costs of producing the novel together with reasonable profits accruing to Tolkien, it does not matter that society may place more value on the novel than the price paid for it. The externalities, i.e., the additional costs that society will pay in order to enjoy the novel need not be accounted for or internalized by the author for the author to recover the investment made in the novel. To allow internalization of all the benefits to society from the production of the novel would allow Tolkien to claim a share in the successes of the movies and claim credit for the music and online games. In other words, allowing full internalization of external benefits would allow Tolkien to claim ownership over the entire spectrum of creative production. It is right that allowing the full

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[21] Biography for J.R.R. Tolkien, *at* http://www.imdb.com/name/nm0866058/bio (last visited September 20, 2006)

[22] The Lord of the Rings film Trilogy, *at* http://en.wikipedia.org/wiki/The_Lord_of_the_Rings_film_trilogy (last visited September 20, 2006)

[23] A leitmotif is a recurring musical theme. It is commonly composed to associate its listeners of a particular piece of music with a particular person, place or idea. It is usually a short melody that is used to bind a work together into a collective whole and enables the composer to relate a story without the use of words or to add an extra level to an already present story. *See* http://en.wikipedia.org/wiki/Leitmotif (last visited September 21, 2006)

[24] Music of the Lord of the Rings film trilogy, *at* http://en.wikipedia.org/wiki/Music_of_The_Lord_of_the_Rings_film_trilogy (last visited September 21, 2006)

[25] Rings best music ever, BBC News at http://news.bbc.co.uk/2/low/entertainment/3177815.stm (last visited September 21, 2006)

[26] http://www.ea.com/official/lordoftherings/bfme2/us/home.jsp (last visited September 21, 2006)

internalization of externalities will create monopolies, as Professor Lemley points out.[27] However, allowing the full internalization of externalities will also affect how copyrighted works are created and produced. If the first producer of a creative work is entitled to capture all consumer surpluses, authorship and the generation of derivative works from the first producer will be stifled as the first producer seeks to increase returns on investment of the first work.

B. *Information Goods: The Cause for Market Failures*

Competitive markets fail for several reasons. In a circumstance where a producer or supplier of a good has market power, the producer or supplier may choose to produce less goods at higher prices goods or receive higher prices for less output. When this occurs, the market is inefficient because an efficient market requires firms to make the same pricing decisions in output production as consumers make in consumption decisions. Markets may also fail where consumers do not have accurate or adequate information about market prices or product quality. Inaccurate or inadequate information may lead to producing too much or too little of a product, consumers making uninformed decisions about the product and prevent some markets from developing. For the market for information goods, the market fails for two reasons – first, the presence of externalities where market prices do not reflect the activities of producers and consumers and second, information is essentially a public good, which once provided to consumers make it difficult to prevent others from consuming. Markets can therefore sometimes undersupply public goods.[28]

Externalities contribute towards market failures because benefits, which accrue to other parties, are not captured within the market for the good. The benefits from the derivative works of Tolkien's novel is not reflected in the market for the novel even though the production of the novel gave rise to the production of three films, its soundtrack and an online game. However, as discussed above, the extension of property rights to allow for the private internalization of these externalities is not only unnecessary but also harmful to the creative process and authorship of derivate works. Introducing private property rights to encourage private bargaining between the affected parties has been said to be able to address these externalities by protecting the goods from interference from others. To a large extent, the law has addressed the failure of the market for information goods and derivatives. The derivative right under copyright corrects this market failure by providing the right to make derivatives to the producer of the work. The three films, its sound track and online games are derived from Tolkien's novel and the production of these new works would have been the subject of private bargaining between Tolkien's estate and the producers of these new works. Private negotiations allow consumer surplus to be captured and internalized to reflect the benefits accruing to society.

Information goods are also public goods that are non-rival and non-exclusive. As information goods are non-rival and non-exclusive, the marginal cost of

[27] Lemley, *supra* note 18, at 1047
[28] Pindyck & Rubinfeld, *supra* note 15, at 592-593

providing the good to an additional consumer is nil and society's consumption of the good cannot be excluded. This nature, allows externalities and free-riding to occur making it difficult or impossible for the market to price and provide information goods efficiently. Where a large part of society benefits from the good, private bargaining through rights provided under copyright may not be an effective way to correct failures in the market. In these cases, private ordering of rights may be necessary to ensure that those who value the goods most would be willing to pay for the good, thereby ensuring that information goods are continuously produced. With an online game involving communities built on the internet, commonly known as massive multiplayer online role playing games, such as the Lord of the Rings, communities of gamers would only be willing to pay the value of the game only when there are technologies that allow exclusivity of the gaming community playing the game. Through technologies that prevent gamers from playing the game without paying for the service through a subscription, game producers will not be willing to provide that service. In fact, this is a point that Professor Lessig makes in *Code and other Laws of Cyberspace* – that the architecture of the Internet can be changed and that private ordering of rights through codes will change the interaction among individuals over the Internet.[29] Market for information goods fail because the nature of information goods creates externalities that cannot be fully internalized. Through law and private ordering of rights, some market inefficiencies are corrected. Through law, investments made in producing creative works can be recovered and producers are able to recover their average costs of production. Through private ordering of rights, facilitated by technologies, producers can ensure that they are able to recover production costs for the good to the extent that the value in the good is captured. The question of where the balance should be drawn to ensure that the private right captures the value of the good and does not go beyond capture of product value to wealth transfer from the user to the producer however remains unanswered.

C. Correction of Market Failures through Institutional Intervention

The correction of market failures in the markets for information goods must be through intellectual property law. For the purposes of literary and artistic works, copyright law provides the institutional intervention to correct the inefficiencies created from consumer surplus that is not internalized by the producer. The reproduction right, preventing the reproduction of the work, captures the value of a work by limiting uses to the work. A user, who pays a price for the purchase of a Lord of the Rings novel, is not entitled to make copies of the book without Tolkien's permission because the novel price does not include a right to make copies of the work. A purchaser of the book has the ability to make copies of the book and sell them, for example, creating a benefit that is not within the market for the Lord of the Rings novel. Similarly, by distributing the novel

[29] In virtual worlds - worlds that are connected through networks, usually the Internet – communities form online and each person controls a character in real space and real time. Each person controls one character among many others controlled by other people in real space and time. The online world is built by the characters that live in it, called "Avatars." Professor Lessig explains this as follows: "Avatar space is "regulated" though the regulation is special. In Avatar space, regulation comes through *code*. The rules in Avatar space are imposed, not through sanctions, and not by the state, but by the very architecture of the particular space. A law is defined, not through a statute, but through a code that governs the space." Lessig, *supra* note 8, at 20

without Tolkien's permission constitute an action that is not accounted for in the market price for the novel. Without the recognition of the distribution right of copyright, producers of literary and artistic works will not be able to efficiently price their works as users freely make copies of the novel and distribute them. The derivative right, to a large extent, protects the producer of works against chains of markets that develop from the producer's initial market that create with them their own positive externalities. When this occurs, the market for information goods cannot efficiently dictate a fair market value for the good as producers are under compensated for the value of the good, thereby causing too little production of the work.

Copyright law provides the market solution by allowing producers of literary and artistic works the ability to capture positive externalities to more accurately reflect the value of their works. It is impossible for Tolkien to capture all external benefits from the publication of the Lord of the Rings. Tolkien has externalized the benefits from his authorship and is not able to internalize the benefits to reflect the true value of his work. Other producers would be able to create derivative works out of the novel and create new markets with new positive externalities that will undermine the investment in and value of the original work. Where producers of literary and artistic works have property rights over the work, they are able to appropriate some of the profits that others make from using their works. Through the property right, which provide producers of literary and artistic works the ability to recover a profit that reflects value of the work, competitive markets are more able to adequately fund authorship and provide encouragement to producers of literary and artistic works to produce works that the market will fund.

The grant of the property right to producers of literary and artistic works in the absolute sense however, will have an adverse effect where producers have the right to determine value and prices for the work. The distortion of markets can also occur when producers price their product above fair market value and in circumstances, where it is difficult to provide a value on an intangible product, such as literary and artistic works, there is a risk of producers over-pricing their product and seeking a return far in excess of the marginal cost of production. When this occurs, deadweight losses are created. The result of such deadweight losses is that some consumers will not be willing to pay more than it costs to produce the work. These consumers will either be denied access to the work or may resolve to piracy to obtain the work at a much lower price below the market.

In market for derivatives, absolute copyright protection will also affect the derivative markets from the initial work. If a producer of the work is given the right to control uses of ideas and impose high licensing fees, the ability of new producers to produce new works will be affected. If Tolkien had the absolute right over Lord of the Rings, the novel, no one else would be able to capture any benefit from making derivatives. The producer of the three Lord of the Rings film, Peter Jackson, would not be able to profit from the sale of the films and would suffer losses if Tolkien had the absolute right to demand the full social value of the invention. Jackson would not be able to capture any benefit from the audiences to the three Lord of the Rings movie.

Rent-seeking behavior by producers of works is also an undesired outcome of absolute property rights. Producers of literary and artistic works may spend large amounts of money to acquire or maintain a monopoly position. An example would be to expand the term of copyright protection[30] or increase the laws protecting copyrighted works.[31] To Professor Lemley, legislative rent-seeking of this form is a cost of government provided rights.[32] Enforcement of copyright is also expensive in terms of legal fees as well as time spent by courts, legislators, law enforcement officers and administrative agencies. Finally, it is harmful to extend protection beyond the point that it is necessary to allow producers of works to recover their investment. The creation of absolute rights allowing the full control over external benefits from the production of the work does not exist with any other form of property. If we were to allow it in intellectual property, we might end up encouraging too much investment in creativity that does not resonate with other forms of production. Professor Lemley discusses the costs of absolute intellectual property rights more thoroughly.[33]

There must be a balance that we must draw to achieve equilibrium in the market for information goods. Rights must be sufficient so that producers of literary and artistic works may recover the investment made to produce the work and make sufficient profits to have the incentive to continue to produce new works. At the same time, we must ensure that the public is able to enjoy the benefits of literary and artistic authorship. Economic theories do not provide a solution. The line between the private right to control and the public interest to access information goods remain an elusive one. As there are so many variables within economic theories that would affect where the ideal balance should be – type of creation, nature of work, market structure, supply and demand of goods, investment made in production, distribution channels, among others - coming up with a single solution that states where the balance is would be impossible. The proper economic balance cannot be found in economic theories. Law and technology scholarship has however shown us that technology may provide a private solution to drawing the boundaries of private ownership. The onus on achieving a fair balance between private rights and public interests lies within the producers of works. We now turn to identifying how technologies may play a role in providing a balance to determining where copyright should begin and where it should end.

2. TECHNOLOGY AND THE LAW OF COPYRIGHT

The development of new technologies has always affected markets for literary and artistic works. Scholars often refer to the printing press as the technology that gave rise to copyright as a system of rules to regulate printing.[34] Authors began to realize the

[30] The Copyright Term Extension Act, passed in 1998, extended the term of copyright in the United States by 20 years. P.L 105-298

[31] The Digital Millennium Copyright Act, passed in 1998, makes it a criminal offence to produce and disseminate technology that would circumvent measures taken to protect copyrighted works. It also increases the penalties for infringing copyrighted works on the Internet. 17 U.S.C. § 1201 (2001)

[32] Lemley, *supra* note 18, at 1064

[33] Lemley, *supra* note 18, at 1058-1065

[34] According to William Patry, Partner at Thelan Reid & Priest, "the printing presses, with its ability to make multiple copies of a work easily, is frequently cited as the impetus for efforts to secure a more formal

economic value of their works as printing presses emerged as a technology that allowed for works to be quickly and cheaply reproduced. Justice Stevens, in delivering the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.* commented that "from its beginning the law of copyright has developed as a response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment – the printing press – that gave rise to the original need for copyright protection. Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary."[35] The role of technology is central in the development of copyright law.

Technology provides producers of information goods with the ability to define their property rights over the work. Technology can either provide or restrict access to works and either strengthen the position of the producer or provide greater freedom to the consumer in their use of the work. Professor Lessig's work has shown us how technology may be used to define the balance between private control and public access to works and that responsible use of technologies will lead us towards greater freedom of creative expression within a reasonable system of property that continues to encourage authorship. The information commons, the area that comprise creative ideas and works that are free to the public to use, which are crucially important to the development of new works and innovation, must be protected against technological controls that erect private barriers and restrict public access to these building blocks of creativity and innovation.

Technology has also provided greater freedom to society to participate in the creative process. More consumers are able to capture the benefits from the production of creative works into their own works and activities, creating derivatives and markets externalities of their own. The reproduction, distribution and derivative rights under copyright become more important to provide a fair market exchange so that producers may capture the fair market value of the work and consumers are able to create wealth from the original production. Several things are clear from the exercise of these rights by the producer of creative works. First, the balance of power between the producer and users will change depending on the technology that is available to either provide control or increase access to works. Second, technologies are tools that will assist producers of creative works grow as markets for information goods change. Third, technology cannot provide the balance between private control and public access to works – only copyright as an institution of law can.

A. Capturing Social Surplus in Markets for Information Goods

We have moved past the questions of whether rights in literary and artistic works should be protected. The answer is yes, which leads us to the question of how we should protect these works. These works should be protected to the extent that the producer of the work is able to recover the marginal cost of production and also make reasonable profits from the production as an incentive to produce. It is difficult and harmful to

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type of protection for books." WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 4 (The Bureau of National Affairs, Inc. 1994)

[35] 464 U.S. 417, 430 (1983)

attempt to capture and internalize all positive externalities. Some of these externalities will not be accounted for in prices for the goods. However, where copyright law clearly defines property rights over the work, the producer of creative works may internalize some positive externalities from the production of the work. In competitive markets this takes place through private bargaining between the producer and consumer of the work. The value of the work is reflected in prices set through negotiations. Transaction costs are incurred through the negotiations for permission to use the work at a fair price.

On the Internet, technologies provide control over works that are not possible in real space. An example of control that would be impossible to enforce in real space is the purchase of a novel. Using the example Professor Lessig provides, a police officer could be sold with each book to ensure that the buyer used the book in a way that was agreed upon when the book was sold. However, the prohibitive costs of selling a police officer with a book to monitor uses of the book will not permit differential pricing for different social benefits that arise from the use of the book. For example, a producer may try to price a book at $1 if the buyer agrees to read it once and at $100 if the buyer plans to read it 100 times.[36] Technologies however, permit this form of bundling and differential pricing to capture social surpluses in accordance to the value each user places on the goods. Media subscription services for information provided over the Internet are a good example of bundling and differential pricing to reflect the user's value for the good. As a result of these new technologies that allow producers to define the boundaries of their property rights, prices of information goods may be set according to the value users ascribe to it – users who value the good more will be willing to pay more, thereby reducing deadweight losses in the market place.

The benefit of technologies in the market may be secondary to the harm that will arise where these technologies are used by producers of information in two ways – one, to draw boundaries around information that rightfully should belong to the commons and two, to prevent the development of technology that allow consumers to capture positive externalities and benefits from the market. In many cases, external benefits are never captured and it would be harmful to society if all producers of information goods were to try to capture and internalize all positive externalities. Professor Lessig gives the example of copyright bots, which are computer programs that scan webpages on the Internet and allow content owners to identify and request sites that contain potentially infringing materials to be shut down. An example is the on-line guitar archive that hosts a site to allow guitar hobbyists to exchange chord sequences. EMI and the Harry Fox Agency requested for the site to be shut down for potential copyright infringement.[37] The difficulties of tracking and internalizing externalities in real space does not apply to the Internet and the potential for drawing boundaries around market activities that are rightfully public and external to the market for the information goods is substantially increased thereby extending rights beyond the necessary limits where the producer of information goods is able to transfer wealth from the public to themselves.

[36] Lessig, *supra* note 8, at 128
[37] Lessig, *supra* note 10, at 182-183

Attempts to capture consumer surplus in the market for information goods also has the potential effect of displacing intermediaries or information carriers, which provide content to users on the Internet. The Napster decision does precisely that. In *A.M. Records, Inc. v. Napster, Inc*.,[38] an Internet start-up, which allowed its users to exchange music files, was shut down. The software that Napster developed provided an on-line community with a service that allowed users to share and exchange files, including MP3s, music files in audio format, through a central server. The software created an extensive network that allowed people to enjoy and share their favorite music and was not different from two friends exchanging music that they enjoy, positive externalities to society that music producers would not have been able to track and internalize in real space. On the Internet, however, this form of market activity was regarded as an activity that the law did not permit. Record companies were allowed to internalize positive externalities from potential markets – markets that the recording companies had not yet captured. Evidence that there was a substantial likelihood that Napster would adversely affect the potential market for copyrighted works was accepted by Judge Patel based on a claim that three general types of harm will occur if the Napster software were to be allowed – a decrease in retail sales, especially among college students; an obstacle to the plaintiff's future entry into the digital downloading market; and a social devaluing of music stemming from its free distribution[39] - effects that recording companies may suffer that however do not justify the expansion of property rights into society.

Consumer surplus should only be captured within existing markets and rights should not be expanded to markets that do not yet exist or which the information good producer has not entered. Rights must be exercised within existing markets and within existing boundaries that clearly define property rights. The Supreme Court in *Sony v. Universal City Studios,*[40] dealt with a novel and new technology – the video cassette recorder (VCR) – by considering largely the general societal benefits, which the new technology brought. The Court regarded these benefits to far outweigh the more nebulous claim by the copyright owner that the use of the VCR crosses "invisible boundaries" of control that copyright owners have over their programs.[41] Regarding the use of the VCR for home time-shifting purposes to be a fair use of a copyright owner's content, the Supreme Court emphasized the requirement that the copyright owner demonstrate some likelihood of harm before a private act of time-shifting is to be condemned as a violation of federal law.[42] Justice Stevens in delivering the majority opinion of the Supreme Court however recognized that this may be a right that Congress did not intend for the copyright owner to have[43] and was very cautious in letting Congress take the lead in

[38] 114 F. Supp. 2d 896 (2000)
[39] *See id.* at 914
[40] 464 U.S. 417 (1984)
[41] Whilst nuances, perceptions and points of philosophy are understandable, the District Court did not think them to be always logical and certainly do not justify an injunction against the use of the VCR. The District Court felt that harm from time-shifting is speculative and minimal. 480 F. Supp. 429, 467 (1979)
[42] 464 U.S. 417, 454 (1984)
[43] According to Justice Stevens, "One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible." *See id.* at 456

looking at the new technology as Congress had examined other innovations in the past. It was not the job of the courts, Justice Stevens reasoned, to apply laws that have not been written.[44] In other words, providers of information goods must only capture consumer surplus within existing markets.

B. Correction of Market Failures Through Technologies

Markets for information goods will always fail precisely because of externalities that prevent adequate expression of benefits to society in price and economic decision making by producers of information goods. Recognizing private property rights in information goods is one way to encourage private producers to fund the production of these goods – goods that are essentially non-excludable and non-rivalrous. Technologies have a significant role in correcting these failures and improving efficiencies in the market. One of the most significant technological developments is the Internet, which potential to connect authors to their audience is unlimited. The inefficiency of markets for information goods can be corrected when technologies are used to ensure that producers of information goods work under proper conditions that encourage authorship and society has access to works that are essential towards social development and growth. Through the proper balance between private property and public interest, information goods may be efficiently produced and allocated in the market.

The economics of creative production has always been dependent on the technologies that allowed cheaper copies of a literary and artistic work to be made and distributed to a far wider audience. The more copies that are made and the more people the work is distributed to would mean greater revenue for the producer. As the printing press altered the economics of information goods production, the Internet has altered the economics for information goods production of this age. What the Internet provides, which technologies prior to it did not, is the ability for producers of information goods to privately order their rights to maximize revenue from the public. Media subscription services allow information to be bundled and packaged suited to the consumer's preference. As many as one million subscribers subscribe to on-line gaming services to be part of a virtual community. Individual tracks of music may be downloaded or streamed from an online music provider and the purchase of films has become possible through the Internet. The media information distributor or news carrier as well as the motion picture company and the sound recording company have been displaces as authors are now directly connected to the consumer of their literary and artistic works.

Professor Paul Goldstein, Lillick Professor of Law at Stanford Law School, portended the changes that copyright markets would face with the Internet twelve years ago in Copyright's Highway. Professor Goldstein wrote about a celestial jukebox, a metaphor for the technological possibilities for copyright markets in the future. The celestial jukebox is a "technology-packed satellite orbiting thousands of miles above Earth, awaiting a subscriber's order"[45] to connect the subscriber to a storehouse of

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[44] *See id.* at 456

[45] PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY, THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX 199 (Hill and Wang 1994)

information and content that the subscriber would pay for and receive. When the metaphor was conceived, its infrastructure was a figment of any imagination but today, the Internet had brought the celestial jukebox metaphor to live.

Professor Goldstein's foresightedness of the changes technologies will bring the market for information goods is very accurate. First, Professor Goldstein believed that the celestial jukebox will reduce transaction costs for negotiating licenses for complete works and for small fragmented works as well. He foresaw the emergence of technologies that will enable copyright owners to charge users differently in accordance to the value of each element of a work that is used. The capacity of the celestial jukebox to charge subscribers for access and to shut a service off if the subscriber fails to pay the bills[46] may be seen in present day music streaming subscription services, such as Rhapsody, an online music catalogue. Second, Professor Goldstein foresaw the greater role authors will play in the market for literary and artistic works and the lessening role that book publishers and motion picture and record producer will have on the market.[47] Today, this may also be seen in the rise of many independent musicians and composers, who have made their music available to the public through online independent music community with free hosting of independent music, such as GarageBand.com.[48]

The reduction of transaction costs as license negotiations become more efficient between producers of information goods and users as well as the displacement of the distributor of content by Internet technologies and networks, both contribute towards correcting market efficiencies in the market for literary and artistic works. New technologies, especially the connectivity facilitated by networks on the Internet have contributed towards a more efficient market for literary and artistic works. However, it is also important to note that the celestial jukebox will not entirely replace traditional copyright markets. In traditional copyright markets, the law is the primary institution to provide an efficient outcome between private rights and public interest.

C. Copyright as an Institution for Balancing Private Control and Public Access

The balance between private control and public access is important in copyright because of the underlying purpose for the grant of property rights in literary and artistic works – to promote education and learning within society from the availability of literary and artistic works. The passing of the Statute of Anne in 1710 by the English Parliament intended to impose the burden of literary and artistic production upon booksellers to meet the public interest for learning as its foremost intention.[49] The property right granted by

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[46] *See id.* at 224
[47] *See id.* at 234-235
[48] More information about the site and the music it promotes is available at www.garageband.com
[49] The Statute of Anne 1710, "had as its foremost objective, the encouragement of learning – a general public interest – not the private economic interests of authors, printers or publishers. It did have a secondary interest for the economic security of authors and other proprietors of books and writings, but this secondary concern was driven by the impact that the void of regulation had upon the creation of "useful books."" Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest,* 44 SANTA CLARA L. REV. 365, 409 (2004)

the law cannot be absolute in the sense that producers may impose prices that go beyond the fair value that consumers would be willing to pay. Some externalities in the market will have to remain external to the market and cannot be internalized. In the House of Lords, in *Donaldson v. Beckett*[50], Lord Camden made a similar observation when His Lordship mentioned that producers cannot maintain monopolistic prices over literary and artistic works for should that occur, "all our learning will be locked upon in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chuses to demand, till the public become as much their slaves, as their own hackney compilers are."[51]

Two aspects of copyright law are particularly important in balancing private rights and public interest. The first – the fair use doctrine, is codified in Section 107 of the 1976 Copyright Act. Section 107 provide guidelines to assist the courts in determining the issues of fair use[52] and the courts have regarded the four factors as being equally important in the courts' analysis of fair use.[53] According to Professor Wendy Gordon, Professor of Law at the Boston University School of Law, fair use is employed to "permit uncompensated transfers that are socially desirable but not capable of effectuation through the market."[54] Where markets do not function effectively to allocate resources between individuals in the market, as when "the markets fail to generate economically desirable outcomes"[55] or "when using the market process would threaten other social goals,"[56] other modes of resource control will be employed by the legal, economic or social system to reallocate resources. The fair use doctrine, the "judicial response to market failure in the copyright context"[57] serves to allocate resources between the copyright owner and users, when it is impossible for users to obtain authorization from copyright owners for the use of the work.

Fair use may have very little application for activities taking place on the on-line market for information goods. Precisely because direct contact is possible between users and producers of information goods, transaction costs to obtain permission for use is substantially reduced and hence, there is very little place for exemptions in the law, including the application of the fair use doctrine.[58] However, the application of the

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[50] Donaldson v. Beckett established the precedent that statute prevailed over common law property rights. Rights and remedies attached to a work were to be determined under statutory provisions. For greater discussion, see WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 13-14 (The Bureau of National Affairs, Inc. 1994); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 175 (Vanderbilt University Press 1968)

[51] L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT 42 (University of Georgia Press 1991)

[52] Factors to be considered in determining fair use is the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole and the effect of the use upon the potential market for or value of the copyrighted work.

[53] American Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 21 (1992)

[54] Wendy Gordon*, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors,* 82 COLUM. L. REV. 1600, 1601 (1982)

[55] *See id.* at 1605

[56] *See id.* at 1605

[57] *See id.* at 1605

[58] Goldstein, *supra* note 45 at 224

doctrine in real space has important effects – resources may be efficiently allocated and wealth distributed between private and public interests. The implication of applying fair use in real space is pivotal to the public's use of information goods for purposes such as research, education and building new works from existing ones.

The fair use doctrine would be able to serve the private right – public interest balance better if the doctrine is construed with the public interest aim in mind. The four factors to be considered under Section 107 do not take into account the interest of society in producing new works from old ones and in using literary and artistic works for the purposes of education and growth. The public interest in having access to works is not read into the framework of Section 107. Indeed, this point was made by Professor Shubha Ghosh, now Professor of Law at the SMU Dedman School of Law, when he said that fair use analysis has always been framed to resolve conflict between two private rights holders.[59] In *Sony,* the doctrine was applied between the motion picture producers and the VCR producer. In *Napster,* fair use was applied between the recording companies and the software producer. In neither case was the right of the public a consideration in determining whether the use of the work was fair or not. In both cases, the analysis focused on the effect of the new technology on the market and economics of the creative content business. Professor Ghosh argues for a fair use construction that does not place the market as the central point of analysis – markets are just one part of the equation that makes the balance in copyright. Other institutions that disseminate information goods to the public, such as libraries and universities, must be placed along with markets to determine the effect of an act upon the public.[60]

Professor Ghosh's argument is a compelling one. In our search for a balance between private rights and public interests, Professor Ghosh argues that copyright law is a form of privatization – the government's way of getting authors to produce literary and artistic works for the public. If that is the case, then there is a need to understand that public good underlies the law and that there may be a need to de-privatize copyright law in order to achieve the public good.[61] Literary and artistic works are not purely private artifacts that are protected by property rights as an entitlement. Rather, the grant of a right serves a larger purpose – literary and artistic production for society's ultimate benefit. Construing copyright as a form of privatization shifts our focus from economics or technology as the primary tools for achieving a balance between private rights and public interests. As I have argued in this paper, economic theories and technological development shows us that there must be a balance that must be drawn between private and public interests but does not offer answers to where the balance should be drawn. Conceiving copyright as a system of privatization allows us to insert public values in copyright analysis, including fair use. This is particularly important, when technologies have made consumers of literary and artistic works into producers of new or derivative works. If technologies have made markets perfect and transaction costs nil, the conception of fair use with the public interest will allow the public to use literary and artistic works for the purposes of education, growth and research.

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[59] Shubha Ghosh, *Deprivatizing Copyright,* 54 CASE W. RES. 387, 484 (2003)
[60] *See id.* at 489-491
[61] *See id.* at 390

The second aspect of copyright that ensures public access to literary and artistic works is the idea of originality. The Copyright Act 1976 expressly provides that ideas are ineligible for copyright protection[62] and the Courts have consistently affirmed the freedom of the public to use ideas of underlying works to produce new and creative works.[63] In *Baker v. Selden,*[64] a system of ruled lines and headings were used to illustrate a method of book-keeping and the Supreme Court had to answer the question of whether copyright existed in the system of book-keeping if there was copyright in the book itself. While it was clear that the book conveyed information on the subject of book-keeping and contained detailed explanations of the art was protected by copyright, it was more evident to the Court that there was a clear distinction between the book and the art which it was intended to illustrate.[65] Novelty in the art expressed in the book should be protected through the patent system. To give to the author of the book an exclusive property in the art through copyright, when no examination of its novelty has ever been officially made, would be to fraud the public.[66] Unless a patent was obtained for the art contained within the book, the public should be able to have access to the ideas contained in the book. Copyright in the book was separate from the ideas in it. While the public cannot print and publish the book or any material in it, the book-keeping system in the book was an art that the public may use and practice.

The decision of Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc,*[67] reflected a more definitive approach to the question of originality. The Court denied copyright protection to compilations of facts unless the compilation, by their selection and arrangement, displayed the requisite originality necessary to protect the compilation under copyright laws. In *Feist,* the Court had to decide if copyright protection could exist for the publication of a typical telephone directory that consisted of white pages and yellow pages. The Court held that there is copyright in the directory as a whole because it contains some forward text and some original material in the yellow pages. However, the white pages were not protected because it did not meet the prerequisite of originality required for protection. “Sweat of the brow” (that copyright was a reward for the hard work that accompanied the compilation of facts) was not sufficient justification for the grant of copyright in the work. The Court held that the grant of copyright in factual compilations is possible in situations where the facts are selected, coordinated and arranged in such a manner that they satisfied the originality

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[62] The Copyright Act 1976 states that “in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b)

[63] In *Mazer v. Stein,* for example, the Supreme Court decided that copyright existed in statuettes but not in the idea of using the statuettes as a base for a table lamp. 347 U.S. 201, 217 (1954). In *Baker v. Selden,* the Supreme Court decided that copyright protected an author’s explanation for a book-keeping method but not the method itself. 101 U.S. 99, 104 (1879). In *Nichols v. Universal Pictures Corp.,* the Court of Appeals for the Second Circuit decided that a copyright in a play did not extend to the underlying ideas and themes of the play. 45 F.2d 119, 122 (1930)

[64] 101 U.S. 99 (1879)

[65] *See id.* at 102

[66] *See id.* at 102

[67] 499 U.S. 340 (1990)

requirement. To the Court, "originality requires only that the author make the selection or arrangement independently (i.e. without copying that arrangement or selection from another work), and that it display some minimal level of creativity."[68] The selection of names, towns and telephone numbers to fill up the white pages in this case was to the Court, "devoid of even the slightest trace of creativity" and was therefore unable to qualify for copyright protection. Although there was sufficient effort exerted to make the white pages directory useful, there was insufficient creativity to make the directory an original work. The Court went on to make it clear that "copyright rewards originality, not effort."[69]

The idea-expression dichotomy however, may not provide a complete solution to the private – public interest balance in copyright. Professor Amy Cohen of Western New England College School of Law argues that the idea-expression dichotomy does not sit comfortably in copyright law because it is difficult, if not impossible to separate ideas from expressions of a work. To provide protection for expressions of creativity in works and to make the underlying ideas available to the public as building blocks of creativity may not be possible because new artists may find it difficult to extract the "idea" without the "expression" of an existing work.[70] On this argument, it is said that the idea-expression dichotomy cannot provide an objective framework for the courts to separate parts of a work that ought to be protected in favor of the author and parts of the work that ought to fall within the public domain. Without an objective or philosophical basis to distinguish ideas from expressions in works of art, an assessment of ideas from expressions will be a subjective determination based on a judge's artistic value of the work. However, we may refer back to copyright law as an institution to further public good in addressing what should constitute free ideas and what should be protected as expressions. Parts of works that society can use as building blocks to further education, learning and growth should be made available as ideas. The test to what constitutes free ideas is whether the idea can be used in another work without seeming like the original expression. Ruled lines in a book for accounting purposes, for example, are ideas that will prevent society from benefiting if protected. Plots of plays, story lines and research findings are ideas that society should be able to use. The way these ideas are communicated to the public and the manner in which plots, story lines and music is expressed to capture society's attention and imagination, are justifiably expressions to be protected to encourage creative authorship.

Fair use and the idea/expression dichotomy allow institutional intervention into markets for information goods to ensure that right holders do not extend rights into realms of the public, where literary and artistic works are needed. Technologies, particularly the Internet, have redefined copyright markets to make bundling, differential pricing and media subscription services tools to correct market failings where prices of goods had not been accurately reflective of the value consumers placed on literary and artistic works. Transaction costs are almost zero and fair use as the judiciary's response

[68] 499 U.S. at 358

[69] 499 U.S. at 364

[70] Amy Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments,* 66 IND. L. J. 175, 231 (1990)

to failing content markets may no longer serve a purpose in correcting market inefficiencies. The only way to ensure that private rights do not overwhelm public interest is through copyright as an institution to encourage authorship for public benefit. Professor Goldstein in the concluding paragraph to *Copyright's Highway* says that "[t]he main challenge is to keep [copyright's] trajectory clear of the buffets of protectionism and true to copyright's historic logic that the best prescription for connecting authors to their audiences is to extend rights into every corner where consumers derive value from literary and artistic works." Rights are important to encourage authorship and respect for copyright as an institution.[71] These rights must encourage authors to produce literary and artistic works first before the public interest can be met. Nonetheless, it is equally important to recognize the rights as serving an end – that of providing literary and artistic works for the public's benefit. Internalizing every benefit in society from the production of literary and artistic works is not the intent of copyright law.

CONCLUSION: WHY THE LAW MATTERS

Consumers and the public in general derive value from the creation of literary and artistic works – we must recognize that authorship is the primary activity that contributes to this benefit. Private rights may be the most feasible manner to encourage authorship. Through the guarantee that investments in producing works will be recovered, authors are more inclined to engage in creative production, even though there may be ancillary reasons to engage in these forms of activity e.g. having the satisfaction from producing art and being able to contribute to the greater social goal. However, realistically, authors must be remunerated for their work. The patronage system of the Crown remunerating authors for their work may still be intact, with the Crown delegating the production of creative works to private firms. The intent still remains the same – literary and artistic works are to be produced for the public interest.

The grant of property rights with the underlying purpose of providing for the more general social goals of learning and education comes with its challenges. The nature of information, being public and essentially non-rivalrous and non-excludable (particularly in real space), creates market externalities that cannot and should not be fully internalized by the producer. Some consumer surplus will not be captured and free-riding will occur. However, that should be an acceptable market condition for information goods. Copyright addresses those inefficiencies and to a large extent, corrects them. Technologies have also contributed significantly to correcting market failures for markets for information goods. Exemptions in law, such as fair use, may have very little effect in addressing market failures because the networks of the Internet build connections between producers and users for consensual bargaining to take place.

The law matters however because in real space, a large segment of society does not have access to creative works and information for development and growth. There is an increasing global awareness that information and knowledge is necessary for

[71] Alina Ng, *Taking Copyright Seriously: Abridging Rights is More Serious than Infringing Rights,* (July 28, 2006). *ExpressO Preprint Series.* Working Paper 1479 at http://law.bepress.com/expresso/eps/1479/

development and movements such as the Access to Knowledge (A2K) movement have made us understand that the law is not merely an instrument for protecting private interests. It is also an instrument that can provide access to works that will benefit developing communities around the globe. The law matters because it serves a larger social goal through the grant of a private property right. By encouraging private firms to produce literary and artistic works through property rights, the larger social goal will be met. Ultimately, copyright's empire is not about how far property rights should extend but how we can encourage the proper conditions for authorship to flourish. Copyright's empire is not as much about entitlement as it is about values. The law matters because without the proper balance between private and public interests, society's needs cannot be met. Copyright's empire is about two things. The first is authorship. There must be proper conditions that will encourage authors to produce literary and artistic works. Without rights provided by the law, authorship will not flourish. The connection authors make with their consumers to provide works that society values will not be happen without a market based system of resource allocation. The second thing about copyright's empire is society. Literary and artistic works are the main sources for education and growth that society needs in order develop. Without these works, society will reach a standstill in the process of development. Society will stagnate the moment the production of literary and artistic works ceases. The law must ensure that society continues to have materials to develop. This can only be done thought a system that is connected to society through free market supply and demand mechanics. Copyright's empire is vast. It begins with the recognition that rights are important. It ends with the acceptance that goals are indefinite. Only through rights protected by law can we meet goals defined by society.