

Taking Copyright Seriously:
Abridging Rights Is More Serious Than Inflating Rights

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Abstract

The proper balance between private rights and public interests in copyright has always been a heated debate. As communication and information technologies converge and develop to enable authors and users of creative works to create and use works without the physical limitations of the analog world, the debate has become more intense. This paper intends to contribute to the debate by bringing attention to basic ideas about rights and the importance of copyright as an institution to ensure that authors create new literary and artistic works for the benefit of the public. Rights under copyright are rights that define the environment to encourage authorship and cannot be undermined as social and technological environment changes in favor of a social goal. To do so would result in a disrespect for the institution that was established to ensure that authorship ultimately contributes to a larger social goal. As rights under copyright are taken seriously as trumps over social goals, we can then attempt to answer some of the more difficult questions within the legal institution, which is the extent rights should invade and affect social welfare on the part of the public. A three-tenet test is proposed to determine when a right under copyright should be abridged. The newly proposed treaty on the Protection of Broadcasting Organizations by the World Intellectual Property Organization is analyzed through the lenses of the three tenet test and this paper presents that the new proposed rights do not affect social welfare and should be acceptable.

I. INTRODUCTION

This paper is intended to contribute to the present debate that is at the heart of copyright law. This is the debate between private rights and public interests. As authors and users of creative works become more empowered through new technologies, the Internet, being a prime example, monopoly rights over the use of intellectual and creative works have extended to include transmission rights and rights to communicate to the public and broadcast.¹ As rights expand in response to the impact converging information and communications technologies have upon literary and artistic works, there are concerns that there is an increasingly important need to maintain a balance between the rights of authors and the public at large, in particular the rights to education, research and access to information. This is because the public has more opportunities to access and use creative materials in novel ways through new communication and digital technologies. This paper presents an argument that there is a very important need to recognize rights that copyright law seeks to protect and that it is more important to recognize these rights under law than to abridge them. This is because the recognition of rights under copyright is a fundamental matter of providing concern and respect for authorship under the law and should not be undermined until and unless the right is expanded to the extent that the cost to the collective social goal goes beyond the cost that is originally paid to grant the basic rights under copyright law.

The right balance within copyright law is a difficult question. It is a difficult question because the balance copyright law strives to achieve, in built within its own system of laws, is often overlooked or missed for the larger socio-economic and developmental goals that have been put forward by advocates of social justice and free speech and by private right holders, who defending their private investments in the production of creative works, regard stronger control of content one of the more feasible ways of recovering investments made in producing creative works. Both arguments present valid points of view. On one hand, there is a need for everyone, who has invested time and money in producing new works to be able to protect others from unfairly profiting from their effort. On the other hand, the public requires access to works for learning, education and as building blocks of creativity to develop new works. This paper acknowledges the validity and legitimacy of the arguments and recognizes that there are specific rights and interests that private right holders and public interest groups strive to protect.

This paper argues however that the copyright system provides the freedom that is necessary in order for the public to have access to creative works and that a true understanding of copyright law removes the necessity to debate the boundaries between private rights and public goals, even as new technologies appear to change the balance between private and public interests. The debate is less a matter of achieving a balance between private incentives and public interests through copyright law. The debate is in, rather, identifying the balance that is built within the copyright system to ensure that

¹ World Intellectual Property Organization Copyright Treaty 1996

private investments in producing creative works are recognized and that the public has access to these works. This is an opportune time to bring our attention back to copyright law and seek our answers to difficult questions of rights and access within the law. Its culture, history, judicial decisions and ideals provide rich insights to allow literary and artistic works to be used for cultural development, economics and education consistent with the basic right to have information and knowledge to enhance one's quality of life.

One approach in approaching the present debate in copyright law can begin through an understanding of what our questions are and identifying the correct answers to our questions through an interpretation of what the law is. The main question at the heart of copyright is "how do we ensure that there are enough incentives to encourage authorship and at the same time recognize and address the need for public access to and use of content?" The pursuit of an answer to the balance between private rights and public interests in copyright law cannot be isolated from political philosophy about rights, duties and obligations. The inextricable link between copyright law and the larger moral questions about rights and responsibilities stems from the conception of copyright as a right given to encourage authorship that meets a public need to have literary and artistic works available for learning. The rights of authors in works however, do not compete with larger social goals, as is assumed in present debates. The present situation is not a question of balancing private interests and social goals because there is no real balance to achieve. The question we are asking is not whether we have inflated rights to the extent that the public right to access works is invaded. There is no real question here because balances cannot be drawn between private rights and social goals but rather only when choices have to be made between competing rights e.g. an author's distribution right against an owner's property right to sell. When society's rights are involved, the question is not a question of where the proper balance between two competing interests is. There is a clear difference that must be recognized between social goals and private rights, society's rights and the rights of members of society. A far more important question that we have failed to ask is how far reaching should private right under copyright be and under what circumstances, if any, is an abridgement of these right acceptable.

Part II of this paper discusses the nature of copyright law and the balance that the law provides between authors and the recognition of the investment made in producing new works and enabling authors to use unprotected portions of other works to produce new ones. This part speaks about the doctrine of fair use and the court's decisions that allow for unprotected portions of content to be used as building blocks of creativity to demonstrate that within the law itself are mechanisms, which the courts recognize as necessary and important to encourage other forms of creativity to occur. Part III analyzes how the arguments that are made to further protect private rights and meet public or social goals and proposes a three tenet test to determine when extension of rights under copyright are not acceptable because the effect on the public's rights to access creative works for learning and education is significantly higher than the cost anticipated when the rights were originally given to authors. Part IV of this paper defends the copyright system as the key answer or the cornerstone and the balance that advocates of private rights and public interests argue for. The copyright system is the legal solution to many of the economic, political and social questions we struggle with today and not the root cause

of the problem. In other words, the social, economic and political issues that arise as a result of our changing environment as a result of technology and the Internet is not the result of an expansion of rights but a misunderstanding of the nature of the law and the ideals it strives to achieve. This paper concludes by offering a slightly different perspective to the discussions that take place today – that there is a necessity to refer to the ideals of copyright and its history and culture to answer many of the questions we pose today and there is an even greater necessity to uphold our basic conception of rights. We may just be surprised by the richness of the copyright system to provide a fair system where authorship and creativity flourishes to the benefit of society.

II. THE NATURE OF COPYRIGHT

Individual rights under copyright are rights that prevail over collective societal goals of learning and growth. According to jurisprudence scholar Ronald Dworkin, individual rights are held by individuals when there are no collective goals that justify the denial of the right or sufficient justification to impose losses or injury upon the individual. In this sense, the rights under copyright law, if we were to base our conceptions of rights on Professor Dworkin's theory, would have a strong anti-utilitarian aspect because the maximization of the public's interest for learning and education would be subordinate to the exercise of individual rights under copyright law. Using Dworkin's theory on the concept of rights, this paper proposes to begin with an understanding of what rights under copyright really are before engaging in the question of where limitations ought to be drawn to prevent the extension of rights so that larger social goals to promote the progress of science and art are not affected. The effect of abridging rights has more detriment to a legal system than an inflation of rights. Rights, to Dworkin, are justified on principles of equal concern and respect that cannot be violated. An abridgment of rights undermines the very legal institution of rights that provide ground rules for a society and rights can only be abridged when the social cost of an expansion is not necessary to protect the right.

Copyright law aims to provide enough incentives for authors to create new works to encourage the creation of literary and artistic works. The law recognizes authors for contributions they make to culture, music and art as a reward for engaging in these activities by granting authors a temporary monopoly over the use of their work because these creative activities ultimately contribute towards a better society.² This recognition by copyright law for creative endeavors allow authors to control how others use their works by preventing them from making unlawful or unauthorized reproductions, distribution, adaptations and public displays of their work.³ At the same time, the law recognizes that there are building blocks of creativity, which authors and artistes use and build upon to create something new. These building blocks of creativity may be playwright characters, novel plots, software logic, legal arguments and ideas that authors

² "...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." MELVILLE B. NIMMER ET. AL., CASES AND MATERIALS ON COPYRIGHT 30 (Lexis Publishing 2000)

³ 17 U.S.C. § 106 (2001)

use to create to express themselves creatively in new ways and this is the very essence of authorship.⁴ These building blocks of creativity – the ideas, plots, story-lines and characters fall outside the law and are free to be used in other forms of creative works. In copyright law, the requirement for originality⁵ and creative expression⁶ for protection, ensure that the other parts of a work that is important for others to build upon remain free and uncontrolled by the author. These include a system of ruled lines and heading used for book-keeping⁷, ideas and themes of plays⁸ and compilations of factual information.⁹

By carving out protected parts of a work and setting boundaries to which an author may legitimately exercise copyright control, the law ensures other authors that there are parts of works that form the body of works that are available to society for free and which can be used without the need to obtain authorization from the original author. This guarantees that some building blocks for creativity are available to those who create new works from available and existing resources. The fair use doctrine is an important leeway in the copyright system to ensure authors of the ability to use existing works to create new ones. At common-law, the doctrine allowed courts to interpret the law in a way that would allow for creativity to occur, especially in situations, where the strict application of the law would stifle creative efforts.¹⁰ The courts have been generous with the application of the doctrine and have based its application in equity or fairness without attempting to define its boundaries for application¹¹ until the doctrine's statutory codification in the 1978 Act as four statutory factors were introduced to assist in the courts' analysis of what may constitute a fair use of a creative work.

The *Sony v. Universal City Studio*¹² case demonstrates the Supreme Court's refusal to interfere with private home uses of copyrighted materials, when videocassette recorders were used to record televised movies. The use of VCRs to time-shift content need not be a productive use for it to be fair under the law.¹³ The more important question to the Court, based upon the statutory provision, was the economic consequences of the use of the work and whether the use affected the copyright holder's potential market or value of the work.¹⁴ The Court also demonstrated its response to an inefficient market that does not efficiently allocate copyright resources between owner and user. In these

⁴ Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 967 (1990)

⁵ *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (1936); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903)

⁶ *Baker v. Selden*, 101 U.S. 99 (1879); *Mazer v. Stein*, 347 U.S. 201 (1954); *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1990)

⁷ *Baker v. Selden*, 101 U.S. 99 (1879)

⁸ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (1930)

⁹ *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1990)

¹⁰ *Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.*, 621 F.2d 661, 662 (1939)

¹¹ *Time Incorporated v. Bernard Geis Associates*, 293 F. Supp. 130, 144 (1968)

¹² 464 U.S. 417 (1984)

¹³ *Id.* at 455

¹⁴ *Id.* at 455

circumstances, where the market place does not generate socially desirable outcomes, the Court assumed the role of allocating resources through the fair use doctrine.¹⁵

III: THE PRIVATE RIGHT-PUBLIC INTEREST DEBATE

The fine line between protection and freedom of property and access is based a legal demarcation between private rights and the public's property or public domain. Traditional legal and economic literature builds upon the idea of copyright property in intellectual creation probably from the principle that authors, who labored over the production of manuscripts, were like farmers, who having mixed their labor with the soil, were entitled to property over that which they labor. In common law, for example, no one was entitled to take another's creative property without permission.¹⁶ The rewards of authorship through the recognition of property right in literature also slowly gained acceptance with the Statute of Anne 1710.¹⁷ The right to print and distribute literature was to encourage authorship and promote learning¹⁸ and allow public access to works, which previously were inaccessible because of the perpetual control booksellers had over the sale of books.¹⁹

What began as an incentive for authorship to flourish later became a right to recover investments made to produce new works. The right to print and reproduce to encourage authorship broadened to include rights of display, adaptation and performance, which attach economic value to works and allow authors to sell their works commercially to the public. Authors recover investments made in producing works by taking advantage of the economic benefit from public sale of works.²⁰ As commercial value in works grow and as investments increase, the rights to economic exploitation of works become increasingly valuable rights to encourage authorship and protect businesses.²¹ The Copyright Term Extension Act²², the Digital Copyright Millennium Act²³ and database protection laws, such as the European Database Directive²⁴, are laws that have been enacted to protect these commercial interests.

Advocacy for rights over creative works have been based on property rights theories that a certain amount of control and exclusivity over property ensured its value and encouraged continuous investment in maintaining and improvising upon existing works. More modern theories within law and economics analysis take the argument for

¹⁵ Wendy Gordon, *Fair Use as Market Failure: A Structured and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982)

¹⁶ LARRY LESSIG, *FREE CULTURE* 90 (The Penguin Press 2004)

¹⁷ HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE* 105-106 (University of Texas Press 1956)

¹⁸ 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)

¹⁹ L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT* 28-30 (The University of Georgia Press 1991)

²⁰ Edmund W. Kitch, *Taking Stock: The Law and Economics of Intellectual Property Rights*, 53 VAND. L. REV. 1727 (2000)

²¹ LARRY LESSIG, *FREE CULTURE* 9 (The Penguin Press 2004)

²² Pub. L. No. 105-298

²³ Pub. L. No. 105-304, 112 Stat. 2860

²⁴ Directive 96/9/EC of the European Parliament

private rights in creative works further by arguing that private property rights are necessary for preservation and maintenance of the value of the work. Works that are free for all to use without the restraint of private rights will be overused by the public as many will use free resources without regard for the cost that the use imposes on others, namely the depletion of natural resources, as in the overgrazing of common pastures. The argument based on Garrett Hardin's 1968 article on the tragedy of the commons, whether rightly so or not because of the non-rivalrous nature of information and knowledge, have been used to justify copyright protection in works – that works under copyright will be kept out of the public domain, which is a necessary step to take to preserve information and works from overuse and depletion by the public.

Advocacy for public interest rights of access to creative works, on the other hand, has always been based on the promotion of learning in the public interest. Rights are only granted over works because authors have to have incentives to create new works. Art, culture, literature and music must be continuously produced to enrich the public and allow culture and society to grow. New technologies and the Internet's ability to build bridges among creators around the world have raised the advocacy for access to copyrighted materials to new heights. The argument is that these new technologies allows for authors and creators from different nationalities to collaborate together and work towards building a new creative culture.²⁵ At the heart of the public interest argument in favor of restricted copyright is the need to have access to information, knowledge and creative works. Access to information and knowledge must be ensured for growth and development to take place and many public interests groups and international organizations have recognized the important role information, knowledge and creative works play in a community or nation and have advanced strong arguments for increased access as a basic right to development and growth.²⁶

The health of the public domain, or the commons, is the central theme at the heart of public interest advocacy. The public domain, the area ineligible for private ownership and the contents of which may be used by the public for free, may be in danger of being eroded by private property rights in content and unless we are careful, we may actually find ourselves in the middle of a second enclosure movement involving intellectual property. The public domain, our environment for free content, may be contaminated by laws and rules enclosing knowledge information and content in the interest of a few private owners and excluding the rest of society from being able to enjoy a free and healthy commons. The movement to privatize content that is free to the public for use, as much as it is necessary to encourage authorship, may very much threaten the health of the commons.²⁷ The movement to enclose private property may further disrupt the creative processes taking place among authors and may ultimately destroy the ecology of the

²⁵ *Id.* at 9

²⁶ WIPO Development Agenda, Creative Commons, Access to Knowledge, Ubuntu

²⁷ The commons has been identified as that area where resources are free, not necessarily without cost but if there is a cost, it is neutrally or equally imposed. Larry Lessig, *The Architecture of Innovation*, 51 DUKE L.J. 1783, 1788 (2002)

public domain, the necessary ingredient for a healthy environment encouraging authorship to flourish.²⁸

In more recent years, there has been increased focus on a much wider issue than merely recognizing the importance of a public domain. A lot of work is being done on developing the commons as a shared resource for everyone. Common property, such as libraries, playgrounds and parks are available for everyone's use in which ever way one chooses and likewise, common resources, which include the Internet, spectrum airwaves for broadcasting and wireless communication and common knowledge about science, culture and our environment should also in the same light, be made freely available to all. The premise for this argument is that property and resources that are publicly inherited and jointly developed and shared must be available to all and must be actively protected and managed so that the benefits of these resources is used for the good of all. The expression of the need to manage the commons for society's collective benefit is succinctly explained in a weblog, OnTheCommons.org, which is dedicated to building a movement to manage the commons fairly and sustainably:-

“The commons is a new way to express a very old idea — that some forms of wealth belong to all of us, and that these community resources must be actively protected and managed for the good of all. The commons are the things that we inherit and create jointly, and that will (hopefully) last for generations to come. The commons consists of gifts of nature such as air, water, the oceans, wildlife and wilderness, and shared “assets” like the Internet, the airwaves used for broadcasting, and public lands. The commons also includes our shared social creations: libraries, parks, public spaces as well as scientific research, creative works and public knowledge that have accumulated over centuries. This is our common wealth, or the commons. The strange thing is, we have forgotten how to recognize the commons and act like the rightful owners of our own riches.”²⁹

Either sides of the argument cannot be ignored. Both present very compelling reasons for ensuring a healthy and proper environment for authorship and creativity. There is an undeniable need for minimal rights to encourage authorship and at the same time these rights cannot infringe upon a larger societal right to the use of the work. There is indeed a very narrow space between private rights and public interests – that narrow space between “zero and one,” which requires a consideration for the developments that have taken place within the realm of copyright. With the current debates that are taking place in many international and regional forums, there is however, a long forgotten but increasingly pressing need to restore the balance that has traditionally defined copyright law for so long and present an affirmative case for copyright as the very essence for authorship. It is easy to get caught up in the debate of necessitating stronger rights under the law to encourage innovation and restraining those expanding rights to ensure the development of a healthy environment for creativity and authorship to occur. In the heat

²⁸ James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW AND CONTEMPORARY PROBLEMS 34 (2003)

²⁹ See <http://onthecommons.org/new> (last visited June 13, 2006)

of the debate, we may however lose sight of what the law is and the ideals the law strives to achieve.

The rights under copyright law recognize authors as right holders in literary and artistic works and these rights were granted to create an atmosphere where authorship flourished.³⁰ The initial cost to society upon the grant of the right in early copyright statutes was the cost of a temporary monopoly over the reproduction of books for a limited number of years. The Government in the grant of the right acknowledged that the right imposed a cost on society because of the monopoly that authors had over the work for the duration of copyright. The right is nonetheless a recognized right that imposed a social cost that ultimately served a larger social goal for the monopoly rights contributed to the production of new works by authors, which then increased public knowledge as new books and creative works are produced.³¹ The right has been expanded throughout the course of copyright law's history. The right was extended to cover moving pictures in the dramatization of novels.³² In 1912, motion pictures became protected works under the Copyright Act.³³ Piano rolls and phonograph records fell under copyright protection in 1909³⁴ and peer-to-peer file-sharing of music through the Internet became illegal.³⁵

As private rights expand, greater cost is imposed upon society as society has less access to creative works. However, the cost to society should not be a reason for curtailing the rights under copyright simply because access to works has become more difficult. The initial cost of a temporary monopoly anticipated by the legislature when giving the right has not changed when the right is expanded. Society is still required to use works within particular boundaries defined by law and bears transaction costs for negotiations and obtaining permission for uses of works. The expansion of rights has not changed the cost that the legislature anticipated when giving rights over works to authors to encourage them to create new literary and artistic works. There is nothing that is different in terms of social cost for the expansion of rights today than the original grant of

³⁰ It is stated that "copyright tends also to serve the material expectations and psychological cravings of the individual creative worker: it gives him an opportunity (though by no means the certainty) of reward for his efforts; conventional recognition for the feat of creating a work; a means (though not a very good one) of preserving the artistic integrity of the work through controlling its exploitation." BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 75 (Columbia University Press 1967)

³¹ It is stated that it is "society's duty to go as far as it can possibly go in nurturing the atmosphere in which authors and other creative artists can flourish. I agree that the copyright law should encourage widespread dissemination of works of the mind. But it seems to me that, in the long pull, it is more important for a particular generation to produce a handful of great creative works than to shower its school children with unauthorized photocopies or to hold the cost of a jukebox play down to a dime, if that is what it is these days." BARBARA RINGER, *THE DEMONOLOGY OF COPYRIGHT*, BOWKER MEMORIAL LECTURE (1974), reprinted in *MODERN COPYRIGHT FUNDAMENTALS* 24-25 (Ben H. Weil & Barbara Friedman Polansky eds., 1985)

³² *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911)

³³ Copyright Act 1912, ch. 356, 37 Stat. 488 (1912). Under Section 4 of the Copyright Act 1909, it is stated that "the works for which copyright may be secured under this act shall include all the writings of an author." Under the 1912 amendment, two categories of writing were added: (1) motion picture photoplays; and (2) motion pictures other than photoplays. Karen L. Gulick, *Creative Control, Attribution and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry*, 27 *CONN. L. REV.* 53, 61 (1994)

³⁴ JESSICA LITMAN, *DIGITAL COPYRIGHT* 39 (Prometheus Books 2001)

³⁵ *A.M. Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (2000)

rights under the Statute of Anne in 1710. The effect of not expanding rights however has a more adverse effect on the copyright system because a failure to expand rights would suggest that rights in literary and artistic works are not legitimate rights and are rights that were only given as a matter of convenience when the rights were originally recognized as they can be overridden and ignored by general claims for social efficiency or increased social cost. There must be a reason to curtail rights as technological and social environments change and the reason must be a great social cost that is unwarranted and unnecessary that goes beyond the cost of the original right.

Abridgement of rights under copyright would be acceptable when three conditions are met. First, the ideals intended under the original recognition of rights, i.e. to encourage authorship and the creation of literary and artistic works are not at stake if the right is not expanded. Second, if the right were expanded, then a competing right would be abridged. Third, if the right is expanded, then there would be a cost to society that would go far beyond the cost paid to grant the original rights under copyright to the extent that abridging or refusing an expansion of the right is justified. This test stresses the importance of rights and the need to take copyright seriously. Where the rights under copyright can be undermined and ignored easily, authorship will be affected because the original rights that authors had over their works would appear to be a sham, which are not upheld when society and the environment changes.

The World Intellectual Property Organization's (WIPO) Draft Proposal on the Protection of Broadcasting Organizations to protect broadcasting organizations would be an acceptable expansion of rights under copyright law if the three conditions to justify its abridgement are not met. First, the ideals of copyright to encourage authorship and the creation of literary works would be affected if the right was not expanded because converging communication and information technologies allow for easy interception and unauthorized use of broadcasts in a way that affects organizations, which have taken the initiative and responsibility for broadcasting content. If the right over broadcasts is abridged, then the ideal that copyright law seeks to achieve, which is the ideal of making creative works available to the public through whatever means will be affected. In this case, creative works are made available to the public by broadcasting organizations and without the recognition of their role in disseminating works, the ideal of copyright law to make works available to the public is affected. Second, the WIPO proposal may be rejected if there are strong competing rights that are affected by the extension. Competing rights of creators of works or authors immediately come to mind and if their rights over their works must be abridged, then there may be sufficient reason to reject the proposal. However, the rights of creators of works are not abridged by the proposal, which recognizes that the protection of broadcasting organizations must be done without compromising the rights of copyright holders. The rights of retransmission, fixation and reproduction under Articles 6, 7, 8 and 9 of the proposed treaty do not impose limitations on the basic rights under copyright that have been traditionally given to authors. The right to reproduction under Article 8 does not refer to the right to make copies of the work but rather the right to make reproductions of fixations of their broadcasts. Authors' rights over their work remain unaffected. Third, there are no identifiable costs to society from the proposal that goes beyond the cost anticipated when the monopoly over creative

works were originally granted. The proposal recognizes the larger public interest in learning, education, research and access to information and the rights proposed do not affect the rights of the public in a way that is significantly larger than the social costs from the early grant of rights over works.

Based on this test, the WIPO proposed treaty would be an acceptable expansion of the right. Using this test, we may focus our attention on what the rights under copyright are and should be. It allows us to steer clear of arguments, which will prevent us from upholding the very right that copyright aims to protect and that is the right for authors to control certain uses of their works so that they may continue to produce new literary and artistic work. By recognizing the importance of rights under the law and not undermining individual rights by giving into larger social goals, we uphold integrity and respect for authorship and authors as individuals. Ultimately, that is the ideal that copyright law strives to achieve. It is only by recognizing this ideal that the larger social goal of learning, education, research and access to information is realized. Until we take copyright seriously, the conditions necessary for authorship will not flourish to serve the larger collective goal.

IV: DEFENDING THE COPYRIGHT SYSTEM

This paper is the recognition of the role copyright law has in encouraging the creation of literary and artistic works that ultimately contributes to the larger social goal of encouraging education, research and access to information. The convergence and development of information and communication technologies impact how literary and artistic works are created and used. From these developments, there is a recognized need to maintain the rights of authors and creators of creative works and yet ensure that the public's need for access to these works is met. However, we must be reminded that as loud as the collective voices in favor of restraining copyright are, we cannot lose sight of the right under copyright that should trump social goals if the law is to be taken seriously for an author has the right to exercise the right under law even if it affects social welfare to some extent. To undermine the rights of authors in favor of the public interest will destroy the copyright system as an institution designed to encourage authorship.

As rights expand together with the development of new information and communication technologies, society feels a cost as the maximization of collective welfare through the copyright system is compromised. However, as demonstrated by the three tenet test in this paper, the loss to society from an expansion of rights may be imaginary and marginal, at most. This is because the costs of a temporary monopoly over works, which is the increased transaction costs that is incurred in seeking permission to use works, remain the same as rights expand. Transaction costs become lower as technologies converge to narrow the gap between author and user and hence as rights expand, the cost to society from the expansion of those rights is low. On that premise, it would be a grave mistake to abridge rights under copyright as technology develops based on the premise that there will be an increased cost upon society from an expansion of those rights.

The premise of this paper is simply to bring our attention back to the basic ideologies of copyright in the raging debates that occur with respect to the law as technology develops. We may lose sight of what the copyright system aims to achieve and that is the creation of an environment where authorship can occur so that literary and artistic works can be created for the public. Ultimately, the public is intended to benefit from the copyright system. Underlying the grant of a private individual right is a social goal to maximize public welfare by having enough materials that will enable the public to pursue education, learning and research. The system itself enables fair uses of the work and ideas underpinning the work are accessible to the public to be used in the creation of new literary and artistic works. The system itself provides the balance between competing rights of authors, who create and who are in the process of creation.

To take copyright seriously, we should understand that the law takes into account our hopes for the future, aspirations to a better world and recognizes the communities that have build up around the law. Any change in copyright law will be in the right direction if this is acknowledged. The law is not about recognizing commercial interests in content and creative works, protecting infrastructure that carries those works or enclosing information and knowledge in the public in the narrow sense. Rather, the law exists to ensure that there are certain conditions that exist to encourage authorship, one of which is the control over how the work is used by the public. The law must also have regard for the number of communities and communal interests that exist that share and build upon common content within a larger global context. Rights under the law cannot be expanded to affect the manner in which new authors use existing works to create new ones. How far a right expands must depend on to the cost that society bears for the expansion. This cost must not be a marginal cost but a cost that goes far beyond the costs of granting a monopoly right in the first place. Copyright's empire is vast and far and there is so much richness in its domain that we will lose sight of unless we begin to recognize that rights under copyright that encourages the creation of new literary and artistic works are rights that should not be taken lightly.

Ronald Dworkin in *Law's Empire* mentions that law is merely not about rules, principles and judge-made law but rather our attitude towards the law and our interpretation and belief in the system. Rights under copyright law cannot be abridged simply because society feels an increased invasion of the collective welfare of having access to literary works. To abridge rights indicate the initial recognition of the right was not genuine and was given by the legislature as a matter of convenience. The effect of this is public disregard for copyright as an institution that ensures authors are protected. In *Law's Empire*, Professor Dworkin explains:

“Law's empire is defined by attitude, not territory or power or process...It is an interpretive, self-reflective attitude addressed to politics in the broadest sense. It is a protestant attitude that makes each citizen responsible for imagining what his public commitments to principle are, and what these circumstances require in new circumstances. The protestant character of law is confirmed, and the creative role of private decisions acknowledged, by the backward-looking, judgmental nature of

judicial decisions, and also by the regulative assumption that though judges must have the last word, their word is not for that reason the best word. Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith in the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have."³⁶

Perhaps there is a need for us to understand copyright law in the same light. As an institution that aims to provide the best route to the future, ensuring that the proper conditions for authorship exists so that society's welfare is maximized through the creation of great literary and artistic works. It is true that the creative community is united in spirit to ensure that the best conditions for authorship exist, even if divided in the ideas on the best way to achieve this. When we recognize and understand that the rights that the law gives authors are very important in encouraging authorship and truly lie at the heart of our social goal of maximizing collective welfare through the use of creative materials for learning and education, we come to the answer to the present debate. The debate of balancing private rights against public interests misses the point we are trying to make, which is that the proper conditions for authorship must exist before literary and artistic works can be created for the public. This can only happen when we take copyright seriously.

³⁶ RONALD DWORIN, *LAW'S EMPIRE* 413 (Fontana Press London 1986)